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IN THE

Supreme Court of the United States

October Term, 1964

No. 850

CONTINENTAL GRAIN COMPANY,
Petitioner,

vs.

CITY OF BUFFALO, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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CONTINENTAL GRAIN COMPANY,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Continental Grain Company (Continental) prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above entitled consolidated case on December 1, 1964, the date of denial of a petition for rehearing.

Opinions Below

There was no opinion of the District Court of the United States for the Western District of New York other than its findings of fact and conclusions of law included in the Joint Appendix printed for the use of the Court below

(Vol. V, pp. 3303-47). The opinions of the Court of Appeals are not yet officially reported but are unofficially reported in 33 U. S. Law Week 2225.

Jurisdiction

The opinions of the judges of the Court of Appeals for the Second Circuit were filed October 29, 1964. The petition of Continental for rehearing filed November 12, 1964, was denied by an order entered by that Court on December 1, 1964, with a further opinion. Copies of the opinions and judgment entered are appended hereto in the Appendix, at pp. 29-68. The jurisdiction of this Court is invoked under 28 U. S. C. Sec. 1254 (1).

Questions Presented

1. Is the discovered peril rule or one similar to the common law last clear chance doctrine applicable in admiralty; and if so, under what circumstances?

2. In admiralty and in a discovered peril situation where one of the parties has received notice and has knowledge of a danger caused by prior faults of other parties and then clearly has ample time and opportunity to avoid the damages by exercising ordinary care and diligence but fails to do so—what are the rights and liabilities of the respective parties for consequent damages sustained (a) by those parties, and (b) by other parties not charged with any contributory fault?

3. In admiralty, where is the line to be drawn between proximate causes and remote causes or conditions, and with respect to unforeseeable consequences?

4. In its rulings on those questions, was the Court of Appeals justified in making inferences and findings con-

trary to findings of fact by the District Court which were not clearly erroneous but were fully supported by the entire evidence?

5. In such rulings, was the Court of Appeals justified in determining that the "precipitating force" of the collision with the City's bridge was negligence of Kinsman and Continental and that it should disregard all of the evidence that the precipitating force of that collision was an ice jam created by negligence of the City of Buffalo upstream in a tributary non-navigable channel which it had constructed and which was under its sole control?

6. Is Continental entitled to exoneration from liability?

7. Is the owner of the Tewksbury (Midland) entitled to exoneration from liability?

8. Is the owner of the Shiras (Kinsman) entitled to limit its liability?

Statutes, Regulations and Ordinances Involved

There are quoted in the Appendix the pertinent provisions of 33 U. S. C. Sec. 494 requiring the prompt raising of the draw of any drawbridge over navigable waters for the passage of water craft, upon reasonable signal (p. 43); 33 U. S. C. Sec. 499 authorizing the Secretary of the Army to make regulations for the opening of the draws of such bridges (p. 43); 33 C. F. R. Sec. 203.707 the regulations promulgated requiring, with some exceptions not here material, that the draw of this bridge be opened promptly on signal for the passage of any vessel at all times during day and night (pp. 43-4); 33 U. S. C. Sec. 403 prohibiting creation of any obstruction to the navigable capacity of the waters of the United States (p. 44); the Buffalo Ordinances requiring shipkeepers for vessels moored in its harbor (p.

41); and 46 U. S. C. Sec. 183 relating to limitation of liability of vessel owners (p. 69).

Statement

It was found and concluded by the District Court that:

(1) About and not later than 10:48 p. m. on January 21, 1959, one of the City's bridge crew then on duty at its Michigan Avenue drawbridge over the navigable part of the Buffalo River received a telephone call that a vessel was adrift upstream coming toward the bridge and the draw should be raised. This call was received at least 29 minutes before the collision with the bridge which finally ensued at 11:17 p. m. as the result of the failure of the bridge crew to raise the draw promptly to its full height. It was made by Captain Balkin, at the City's fire station adjacent to the bridge immediately after he received a call from the Coast Guard. (R. Vol. V, pp. 3313-5.)

(2) The drifting vessel was the steamer Shiras. She had been moored at Continental's grain elevator property about 2½ miles above the bridge, headed upstream starboard side to the dock, with a shipkeeper on board. She had been broken loose from her moorings at about 10:40 p. m., during a winter thaw, by the force of a mass of ice which had twice been jammed upstream and was finally forced into and down the navigable part of the Buffalo River. (*Id.*, pp. 3305-7, 3315.)

(3) After drifting stern first about 1½ miles downstream, the Shiras collided with the steamer Tewksbury moored, without her shipkeeper on board, at the Standard elevator and at a bend in the river about a mile above the bridge. That collision broke the Tewksbury adrift, also stern first, and that ship came down the River closely followed by the Shiras. (*Id.*, p. 3307.)

(4) A second warning call that a vessel was adrift upstream approaching the bridge and that the bridge should be raised, was received at the bridge about and not later than 11:07 p. m. and at least 10 minutes before the collision of the Tewksbury with the bridge. It was made by the night watchman at the Standard elevator, where the Tewksbury was moored. It was received at the bridge by one of the bridge operators, Szumiinski, whose shift of duty at the bridge commenced at 11 p. m. and who had arrived at about that time. The operating time required to raise the bridge to its full height (82 ft.), with either standard or auxiliary power, was not more than 70 seconds. The draw of the bridge had been raised only about 8 feet when the Tewksbury reached and collided with it. Had the draw then been raised to its full height the vessels would have passed through safely. (*Id.*, pp. 3314, 3317-8.)

(5) Each of these warning calls was received by the members of the bridge crew in time to allow ample opportunity, in the exercise of ordinary care and diligence, to clear the traffic and raise the draw before the vessels reached it; but no attempt was made to raise the draw until the Tewksbury was so close that the collision with the bridge could not be avoided, despite adequate and timely notice that a vessel was adrift in the river and approaching the bridge. Claimant Szumlinski, the bridge operator who received the second warning call and was then in charge of the operation of the bridge, was found negligent, on the same grounds. (*Id.*, pp. 3315, 3317, 3329-30.)

(6) The bridge wreckage and the ship wedged in it effectively dammed the river and caused flood damage to various properties upstream including Continental's grain elevator (*id.*, p. 3307).

(7) Continental and Kinsman were found to have committed some earlier faults. The fault attributed to Continental was the failure of a deadman, one of the facilities on the dock and bank to which one of the 15 or 16 parts of the mooring lines of the Shiras was fastened, and which was pulled out of the ground by the force of ice which broke or tore off the ship's winches all of her other mooring cables and hawsers. The faults of Kinsman were the failure of its Captain Davies to drop at least one of the vessel's anchors in the bed of the river when remooring the Shiras at this berth; and the failures of its shipkeeper to release the devil's claws on the anchor chains when he first became aware that the ship was in danger of breaking her lines, and then releasing the compressors on the anchors before taking off these claws, just after the vessel had broken loose, thus jamming the anchor chains and preventing the anchors from dropping. If her shipkeeper had not negligently failed to drop the anchors of the Shiras after she had broken loose, her collision with the Tewksbury and the collision with the bridge would probably have not occurred. (*Id.*, pp. 3318-20.)

(8) Since the result of such prior faults of Continental and Kinsman was made obvious to the City's employees in ample time for them to have raised the draw to its full height and thus avoid the collision with it, and "because the City had the 'last clear chance' of avoiding the damage," the District Court held that the City could not recover on its claim for several million dollars damages against Continental and Kinsman; and that Continental and Kinsman could recover from the City the full amount of their damages resulting from that collision (*id.*, p. 3320). The City was held liable for the negligence of its bridge crew and its violation of its statutory duty, under the applicable federal statutes and regulations, to raise the draw

promptly to its full height for the passage of approaching vessels (*id.*, pp. 3317-8).

(9) A different determination was made by the District Court as to liability for the property damages of other parties not charged with contributory fault who also sustained flood and other damages as the result of the collision with the bridge and the damming of the river, "because as to those claim no issue of contributory negligence is present, and accordingly the 'doctrine of last clear chance' does not apply." Consequently the City, Kinsman and Continental were held liable on the basis of mutual fault, each one-third, for the claims totalling about one million dollars of these other parties, subject to Kinsman's right to limit its liability to $76,788.45, representing its interest in the Shiras and freight pending, plus the amount to be realized on its $75,000 claim for damages against the City. The deficiencies in such recoveries from Kinsman, as the result of that limitation, were assessed against the City and Continental, each one-half. (*Id.*, pp. 3321-3324.)

(10) As to the claims for damages sustained prior to the collision with the bridge as the result of the collision between the Shiras and the Tewksbury at the Standard elevator, substantial although relatively small in amount, the City and Midland were exonerated and Kinsman and Continental were held liable on the basis of mutual fault, each for one-half, subject to Kinsmen's right to limit its liability to the amount above stated and to the assessment against Continental of any deficiency not recoverable from the Kinsman limitation fund (*id.*, p. 3322).

An interlocutory decree was entered so determining the rights and liabilities of the parties, leaving questions as to amounts of damages for later determination (*id.*, pp. 3333-9).

The Court of Appeals ruled that the discovered peril or last clear chance rule is not applicable to this case. It accordingly modified the interlocutory decree so that, in substance, the damages of the City, Continental and Kinsman resulting from the collision with the bridge were divided among them equally on a mutual fault basis, subject to Kinsman's right to limit its liability. Some further provisions were made as to how the Kinsman limitation fund should be applied. As so modified, it affirmed the decree.

In so ruling, the Court of Appeals made inferences and findings contrary to findings of fact by the District Court which were not clearly erroneous but were fully supported by the entire evidence. It also determined that the "precipitating force" of the collision with the City's bridge was the negligence of Continental and Kinsman, and that it should disregard all of the evidence that this precipitating force was the ice jam created upstream and that it was created by negligence of the City.

(1) As to the Failure of the City to Raise the Bridge Draw Promptly

The Court of Appeals said:

> "The inference is rather strong, despite contrary testimony, that the operator on the earlier shift had not yet returned from a tavern when the telephone call from the fire station was received; that the operator on the second shift was tardy in arriving; *and that it was thus impossible to raise the bridge until too late.* * * *
>
> "None of the cases in which this Court has applied the last clear chance rule to impose sole liability in admiralty is at all analogous to this one; indeed we doubt whether this case would come within the principle as generally applied at common law. * * * In the other cases relied on by Continental and the Shiras, as in those just cited, the vessel solely charged had en-

gaged in dangerous conduct *in full knowledge of the peril created by the other's fault*, * * *. Furthermore, if, as we believe, what really happened here was that neither of the bridge operators was on hand in time to raise the bridge, the situation is one in which, in any realistic sense, the breach of duty—the first operator's going to the tavern and the second operator's starting late from home—*was prior to any knowledge of the peril, and there was no possibility of remedy after the danger was discovered.* * * *

"The last clear chance doctrine, not very satisfactory at best, has been utilized in admiralty *quite selectively*, to free a claimant from the consequences of a *rather low degree* of negligence in creating a dangerous situation of which the party whose activity led to the damage was well aware and which he could *easily* have overcome." (Emphasis added; app. pp. 33, 48-9.)

As pointed out in Continental's petition for rehearing, the first warning call was unquestionably received by some member of the bridge crew, the tavern was only 70 feet from the place where it was received, and the first bridge operator, Mack, could have been reached easily and promptly (R. Vol. VI, p. 45). Mack had testified that when he went over to the tavern about 10 p. m. he left one of the bridge tenders in charge, with the understanding that if any telephone calls were received, he would come over to the tavern or call Mack on the telephone at that place (R. Vol. III, pp. 1926-7). As Mack also testified, he had been alerted about 10 p. m. by the operator of the City's South Park Avenue bridge over the Buffalo River, about four miles above, that there was some unusual situation upstream which had prompted the City's Commissioner of Public Works and Engineer to go to the South Park Avenue bridge that evening and that they might come to the Michigan Avenue bridge, and that there was a lot of ice coming downstream (*id.*, pp. 1904-5, 1862, 1868).

As also pointed out in that petition, the City had put itself in an untenable position by the admissions in its answers to interrogatories before trial that the first warning call had been received at the bridge from Captain Balkin, and the conflicting testimony of the members of its bridge crew at the trial, each of whom then denied receipt or any knowledge of that call. The City was not entitled to any inference that the first bridge operator had not been promptly notified of that call or to any other inference in its favor on these points. (R., Vol. VI,.pp. 45-6.)

It was also pointed out that there was undisputed evidence that the second warning call was received at the bridge by the second operator, Szumlinski, who had arrived at the bridge about 11 p. m.; that Mack had then returned to the bridge from the tavern and was with Szumlinski and was informed of the second warning call immediately after Szumlinski had received it, and both operators then had full knowledge of the peril and at least 10 minutes and ample time to raise the draw; and that there was no evidence that the second operator was late in arriving and had not received that call, and was not on hand in time to raise the bridge (R., Vol. VI, pp. 46-7).

In denying the petition for rehearing the Court of Appeals modified the language of its majority opinion by changing the interval of time between the first and second warning calls from "ten",to "twenty" minutes; by changing the words commencing with "that the operator on the second shift" in the first sentence above quoted, to read:

> "that the operator on the second shift did not arrive until *shortly* before the call from the elevator where the Tewksbury had been moored; *and that in consequence the bridge was not raised until too late.*"

and by changing the sentence starting with the word "Furthermore" above quoted, to read:

> "Furthermore, if, as we believe, what really happened here was that neither of the bridge operators was on hand to raise the bridge when the first warning came, and the second operator had *just* arrived at the time of the second warning, the situation *may well have been* one in which 'defendant *did not in fact* have a chance of avoiding injury to a negligent plaintiff but *would have had* such chance had it not been for some prior negligence." (Emphasis added; app., pp. 67-8.)

Was not the first operator "on hand" when he was only 70 feet from the bridge and could promptly be reached by the man he left in charge? Whether the second operator arrived at the bridge 7 minutes before the second warning call or "shortly" or "just" before he received it, the fact remains that he then had 10 minutes and ample time and opportunity to avoid the collision. As the Court of Appeals had found, he needed not more than 2 minutes and 10 seconds to go to the control tower, start the engine, and raise the draw to its full height (app. p. 33).

As so modified, the inferences and findings made by the Court of Appeals were still contrary to the relevant findings of the District Court on this important issue. The District Court had held unequivocally that: "No attempt was made to raise the bridge until the Tewksbury was so close that the collision with the bridge could not be avoided despite adequate and timely notice to the bridge that a vessel was in the river and approaching the bridge," and that the warning calls were received by the City's bridge crew "in time to allow ample opportunity in the exercise of ordinary care and diligence to clear the traffic and raise the bridge before the vessel reached it;" and specifically that the second bridge operator was negligent on those grounds, and that the City did in fact have "the last clear chance" to avoid this collision. (R. Vol. V, pp. 3315, 3317, 3320-1, 3329-30.)

The Court of Appeals also said:

> "If the City had deliberately kept the bridge closed in the face of the onrushing vessels, taking the risk that they might not come so far, no one would give house-room to a claim that it 'owed no duty' to those who later suffered from the flood." (app. p. 52.)

The record showed that this was what the City's operators did on this occasion, taking all risks in deliberately keeping the bridge closed after receipt of the warning calls. The City's case left their failure to act unexplained and inexcusable. The record included evidence of the City's employees at the adjacent fire station of a long period of no activity whatever at the bridge after the first warning call, and then a long period of inactivity of the two bridge operators standing on the bridge, one with a flashlight, after Captain Balkin had observed the form of the Tewksbury, causing lights along the shore to appear to go off and on, when that vessel was 2,000 or 2,500 feet above the bridge. (R. Vol. II, pp. 1203-8, 1213, 1229-33, 1239; Vol. III, pp. 1594, 1886-8.)

(2) As to the Precipitating Force of the Collision with the Bridge

The Court of Appeals concluded that:

> "Here it is surely more equitable that the losses from the operators' negligent failure to raise the Michigan Avenue Bridge should be ratably borne by Buffalo's taxpayers than left with the innocent victims of the flooding; yet the mind is also repelled by a solution that would impose liability solely on the City and exonerate the persons whose negligent acts of commission and omission were the precipitating force of the collision with the bridge and its sequelae." (app. p. 59.)

In reaching this conclusion, that Court disregarded all of the uncontroverted evidence that the actual "precipitat-

ing force" of the Shiras breaking adrift and of the collision with the bridge was the main body of the ice jam which was created upstream and was finally forced into the navigable part of the Buffalo River where the Shiras was moored, that it was created by negligence of the City, and that this ice jam and the main body of it which broke the Shiras loose were crucially different than the conditions in prior years, in degree, size and destructive effect.

The Court of Appeals said it would disagree with the District Court's findings that the claimed faults on the part of the City, in creating and failing to control ice jams and flood conditions upstream were not proximately contributing causes of the collision with the bridge. That Court, however, did not reach consideration of them because it accepted the District Court's conclusions that the City "had not created a special hazard of ice jams" and that its failure to dynamite the ice jams was not negligent, and stated that those conclusions were based on "conflicting" evidence (app. pp. 35-6.)

There was no conflict in the evidence on those subjects. On behalf of the City, it was merely argued that as a matter of law it had no obligation to remove obstructions in Cazenovia Creek, or to prevent them from causing hazards in the navigable part of the Buffalo River, or from being obstructions to the navigable capacity of those waters, and that it should not be held liable for violation of 33 U. S. C. Sec. 403 which prohibits "creation of any obstructions not authorized by Congress to the navigable capacity of the waters of the United States."

The disregarded evidence as to the creation by the City of the hazards of ice jams and the necessity of dynamiting them included: A report in 1958 from the Commissioner of

Public Works to the Common Council that a gravel bar had formed in Cazenovia Creek below Cazenovia Street "*causing a bad ice jam in the late winter breakup*" (*R.* Vol. V, pp. 3444-5); a report in 1956 from the City Engineer that many willow trees along Cazenovia Creek had been undermined at the roots and had fallen and were falling into the stream, creating bars "to stop or slow up the ice movement, which in turn backs up the water to overflowing levels," and that "some immediate action should be taken by the proper departments before this condition worsens to a more costly project" (R. Vol. IV, p. 2515); and a report to the same Body that:

> "On December 31, 1951, at midnight, the ice jam in Cazenovia Creek became such a hazard as to endanger the whole area and also the South Park lift bridge. It was necessary to dynamite this ice immediately so that we would prevent the danger of a flood in the South Park area and damage to the bridge * * *" (R. Vol. V, p. 3444).

The City's Commissioner of Public Works admitted that he knew before this occasion that ice piled up in Cazenovia Creek each year in this same area below the Cazenovia Street bridge (R. Vol. IV, p. 2438). He also admitted that the engineers employed by the City to study and report on the Cazenovia Creek ice and flood conditions after this disaster recommended deepening of the channel in the Cazenovia Street bridge area (*id.*, p. 2478). The City had many years previously, for flood control purposes, deepened the channel in the Buffalo River from the upper D1&W bridge to and above the junction with Cazenovia Creek, but had permitted that channel to silt up so that in January 1959 the depth of water in it was 4 feet or less (*id.*, pp. 1951-2). This was a cause of the second ice jam on January 21, 1959 and of lesser ice jams in prior years at the same place (R. Vol. II, p. 843; Vol. V, p. 2905). The City

had admitted it had not done any dredging, clearance or maintenance work in these channels for at least 15 years prior to January 21, 1959 (Ans. to Int. 28, Vol. V, pp. 3249-50). Among other faults, the City had reconstructed the Cazenovia Street bridge over Cazenovia Creek with a reduced vertical clearance despite the warning from the U. S. Engineer that, "It is assumed that the City of Buffalo is cognizant of the effect a 3 inch less vertical clearance of bridge opening will have on ice jams in Cazenovia Creek" (R. Vol. V, p. 3447). The City's records showed that on one or more occasions in each of eight out of the eleven years prior to 1959 ice jams had occurred in these same areas upstream, making it necessary to dynamite them, and the City had done so (*id.*, pp. 3246-7, 3249).

The other disregarded evidence as to the precipitating force which broke the Shiras adrift and ultimately caused the demolition of the City's bridge was substantial. To summarize it:

About 6 p. m. on this evening the surface ice in Cazenovia Creek above the Cazenovia Street bridge began to break up in large and thick cakes which moved down under that bridge and were stopped and jammed about 200 yards below it. This ice jam continued to build up rapidly until the ice was packed up tight against and rose above the floor of the Cazenovia Street bridge (R. Vol. I, pp. 498, 500-9; Vol. V, p. 3203). It caused an extraordinary flash flood which resulted in extensive property damage and endangered lives and the bridge itself. The size and effects of this ice jam in Cazenovia Creek and of the resultant flash flood were conditions without precedent since completion of the City's work to prevent such occurrences, in 1928. (R. Vol. I, pp. 615-7; Vol. IV, pp. 2094-7, 2102-9, 2124-6, 2134-41; Vol. I, p. 580.) The City's officials so admitted (R. Vol. IV, pp. 2461, 2519).

About 6:30 p. m. the pressure of the water dammed by that ice jam forced it down Cazenovia Creek, tearing away and carrying with it many trees which the City had planted along its banks. It was stopped and jammed again about 6:45 p. m. in the non-navigable part of the Buffalo River a short distance below the junction of it with Cazenovia Creek, at and above the upper DL&W bridge and also in a channel constructed and controlled by the City. (R. Vol. I, pp. 508-26; Vol. V, pp. 2281-2, 2948.) It was there permitted to build up for hours in size and force by accumulating large amounts of broken surface ice "coming solidly" down Cazenovia Creek from miles upstream (R. Vol. I, p. 582). It was not dynamited because the City's employee on flood and ice patrol duty that day had left the scene for dinner when the jam first formed, and when he returned after it had been forced down Cazenovia Creek he did not follow its movement into the Buffalo River and did not ascertain that it had jammed again (R. Vol. V, pp. 3165, 3185-6). He was on duty until 8:30 p. m., admitted that he knew the ice had jammed in Cazenovia Creek causing the prior flood and had gone down the Buffalo River, but could not explain why he had not gone down to ascertain what happened to it (*id.*, pp. 3185-6).

There was no evidence that "from about 10 p. m. large chunks of ice and debris began to pile up between the Shiras' starboard bow and the bank" as the Court of Appeals found (app. p. 32); and there was no evidence of any significant amount of ice in the part of the river where the Shiras was moored, until about 10:20 p. m. The shipkeeper on the Shiras then heard some noises that sounded like thunder and went out on deck (R. Vol. I, pp. 313-4). He saw big chunks of ice coming down the river, some eddying and swirling in the current and bumping up against the *port* side of the vessel and some going down

the middle of the river (*id.*, pp. 291-2, 313-4). There was no indication of any excessive strain on any of the ship's lines and he went back into the galley (*id.*, pp. 293-316). About 15 minutes later, or about 10:35 p. m., he felt the Shiras surge and again went out on deck. The river was then "packed solid" with a "jam of ice" and "from the starboard side it was beginning to crowd around the Shiras," and shortly thereafter the bow of the ship moved out rapidly toward the middle of the river (*id.*, pp. 293-6, 320). The other eye witnesses, both disinterested, of the river condition at and just above the place where the Shiras was moored shortly before and at the time she was broken adrift, described it as packed solidly from bank to bank with some large chunks of ice "piled one on top of the other," accompanied by numerous trees, with no water visible, and the "greatest mass of ice" seen by them in many prior years of experience with that part of the River. (R. Vol. V, pp. 2636-7, 2640-5, 2625; Vol. I, pp. 529, 571-2, 582-3). There was other strong and uncontradicted evidence that the Shiras was torn loose by the main body and heaviest part of the ice jam as it came downstream (R. Vol. I, pp. 533-4, 539-40, 585-6).

There was also uncontroverted and disregarded evidence that other vessels of about the same size as the Shiras had been moored at this berth every winter for many prior years and had not been endangered by currents or ice coming down the river, and that the ice had never before piled, packed or forced between the bank and the bow of a ship moored at that place (R. Vol. V, pp. 2186-7, 2643-5, 2664, 2754-8, 3070, 3089).

In holding that the ice conditions on this occasion were not unexpectable, the Court of Appeals, said that they were of the same sort that had been occurring for years,

"although not in quite the same degree" (app. p. 38). As shown by the uncontradicted testimony of disinterested witnesses, the difference in degree was crucial, in the flooded area when this ice jam first formed upstream, and at the place where the Shiras was moored, when the main body of it was finally forced down to that part of the river.

(3) As to the Exoneration of Midland and the Tewksbury

In substance, the Court of Appeals held that while it was negligent to leave the Tewksbury unguarded that night, especially in view of the requirements of the Buffalo Ordinances, the presence of her shipkeeper on board and his dropping her remaining anchor *might not* have had a significant effect (app. p. 41). It is claimed that it was incumbent upon Midland to prove that his presence and taking such action *could not* have had that effect, that it has not so proved, and that if it be held the City is not solely liable for all damages resulting from the collision with the bridge, Midland should not be exonerated. *United States v. Carroll Towing Company*, 159 F. 2d 169 (2 Cir. 1947).

(4) As to Kinsman's Right to Limit Its Liability

The Shiras was moored in a port not far distant from her owner's office and was acting as a warehouse to hold grain in winter storage. This was a nonmaritime service. *Pillsbury Flour Mills Co. v. Interlake SS Co.*, 40 F. 2d 439, 440-1 (2 Cir. 1930); cert. denied 282 U. S. 845.

Kinsman's president had no information and made no effort to obtain any, as to winter weather, river or harbor conditions at Buffalo, or as to the manner, adequacy, and safety of the winter moorings of its vessels at that port

or elsewhere (R. Vol. I, pp. 606-8). It relied upon the United States Salvage Association to perform all of those functions. While Kinsman's Masters customarily moored their ships for the winter and Kinsman or its Buffalo agents customarily furnished a vessel Master to supervise any winter remoorings, Kinsman did not rely upon them in respect to the adequacy and safety of the moorings, and did "not take their judgment" but relied "solely on United States Salvage Association" (*id.*, pp. 608-9). Asked who ordinarily moored one of its ships at the assigned berth for winter lay up, Kinsman's president answered: "The Master, and he doesn't moor her until the U. S. Salvage Association tells him how to moor her" (*id.*, pp. 610-11).

While it was necessary to have winter moorings of its ships approved by U. S. Salvage Association or another recognized classification society to maintain the validity of its insurance policies (R. Vol. I, p. 609; Vol. V, pp. 3210-3218), the decisions to select that particular Association instead of another society and to delegate to it all of the general superintendence of the part of Kinsman's business pertaining to the adequacy and safety of winter moorings of its vessels were made by Kinsman's president.

One of the U. S. Salvage Association's surveyors attended with Captain Davies when the Shiras was remoored on January 7, and went to her again on January 8 to inspect the completed mooring and knew how she had been moored (R. Vol. I, pp. 76-80, 172). Its Resident Surveyor in charge of its Buffalo office had been on board the Shiras with Captain Davies between January 8 and January 21, observed her moorings and knew she was moored without an anchor, as customary at that berth (*id.*, pp. 357-9, 369). Its Principal Surveyor for the Great Lakes District who had issued the certificate of mooring approval to Kinsman

(R. Vol. V, pp. 3242, 3368) testified that it had not required use of an anchor or anchors at that berth and that he knew it was not the practice to use them in winter moorings of vessels at that place (*id.*, pp. 3649-67).

If, as the Courts below have held, Captain Davies was at fault for remooring the Shiras at this berth without dropping an anchor in the bed of the river, it necessarily follows that this was also a fault and with the privity and knowledge of the U. S. Salvage Association. Thus, the question presented by the facts of this case is whether the privity and knowledge of that agency, as Kinsman's *alter ego*, was not also the privity and knowledge of Kinsman. *Benedict on Admiralty*, 6 Ed., Vol. 3, pp. 388-90. *The James Griffiths (Sperry Flour Co. v. Coastwise SS & Barge Co.)*, 84 F. 2d 785, 786 (9 Cir. 1936).

A further question is presented as to Kinsman's right to limit its liability for contribution to Continental because of its breach of its "personal contract" with Continental. That contract was the November 5, 1958, charter for carriage of cargo to Buffalo and for winter storage and mooring at that Port, between Continental and Kinsman, made on Kinsman's behalf by its Vice President, which incorporated by reference the provisions of the "Standard 1936 American Form Bill of Lading" (R. Vol. V, pp. 3352-3), including the following warranty under the heading "Special Contract for Winter Storage":

> "2. The shipowner * * * does warrant to use due diligence to furnish a seaworthy vessel as a bulk carrier of grain for the storage period. * * *" (R. Vol. V, pp. 3357-8).

For damages from any breach of such a personal contract Kinsman cannot limit its liability to Continental. *Benedict on Admiralty*, 6th Ed., Vol. 3, pp. 371, 374.

The primary claim of Continental as to breach of this express warranty was not in respect to insufficiency of the number of mooring lines on board, as claimed by other parties, but in failing to use due diligence to man that vessel with a competent and properly instructed shipkeeper. *The Cygnet*, 126 F. 742 (1 Cir. 1903); *State of Maryland*, 85 F. 2d 944, 947 (4 Cir. 1936). Captain Davies testified that he told the shipkeeper of the Shiras "that the dogs were off the anchors, but the devil's claws were on * * * and in case of any emergency that he should be sure to get those claws off first" (R. Vol. I, pp. 218-9). The shipkeeper denied that he had received any such instructions and said he didn't know whether the claws were engaged or free at any time before the Shiras was broken adrift (*id.*, pp. 322, 339). Either the shipkeeper had received such instructions and was not competent to understand and remember them, or if he had not received them he was not properly instructed.

This personal contract or charter was of a dual nature, maritime in respect to the voyage to Buffalo and nonmaritime as to the winter storage and winter wharfage to commence upon her ending that voyage (*Pillsbury Flour Mills Co. v. Interlake SS Co.*, *supra*, 40 F. 2d 439). The special contract containing this express warranty related to those nonmaritime services after the end of the voyage. It was a continuing express warranty "for the storage period," and not an implied warranty ending with the breaking of ground for a voyage such as that referred to in the opinion of the Court of Appeals (app. p. 40, n. 3).

Admittedly there was no loss of cargo, but in this contract Kinsman dealt with Continental both as a wharfinger and as a cargo owner. It was thereby agreed that Continental would furnish a winter berth to the vessel; and

when the original cargo was found heating and it was arranged to have it unloaded and the vessel reloaded and remoored, it was specifically agreed between Continental and Kinsman's Vice President that the Shiras would be remoored at this upstream berth at Continental's elevator (R. Vol. I, pp. 21-33; Vol. IV, pp. 2252-4; Vol. V, p. 3352). Continental, as the wharfinger, will sustain a large loss if held jointly liable for the damages from breaking adrift of the Shiras. It claims that if so held, Kinsman should not be entitled to limit its liability for contribution to it because the loss was not sustained by Continental as the cargo owner.

The Basis for Federal Jurisdiction in the Court of First Instance

The cases consolidated in the Courts below involved claims for damages resulting from collisions between and with ships on navigable waters and proceedings for the limitation of liability of vessel owners under 46 U. S. C. Sec. 183 and cross-claims filed and determined in those proceedings pursuant to *British Transport Commission v. United States*, 354 U. S. 129 (1957).

Reasons for Granting the Writ

This decision of the Court of Appeals on important questions of federal and admiralty law is in conflict with the decisions of other Courts of Appeals on the same matters and with many prior decisions of that Court. These questions have not been, but should be, settled by this Court.

The Court of Appeals here decided that the discovered peril and last clear chance rule is to be applied in admiralty "quite selectively" and only to free a claimant from the consequences of a "rather low degree" of negligence of

which another party was aware and could "easily" have overcome. That Court and many other admiralty Courts had previously held the rule to be applicable in admiralty to situations in which the prior faults had been major and not minor or of "rather" low degree, and where the other party made aware of the peril could have overcome it by "using ordinary care." As pointed out in the dissenting opinion, the majority opinion also raised questions as to whether "the courts should, or have the power to, create a vast judicial insurance company which will adequately compensate all who have suffered damages" and that it, "in effect, would remove from the law of negligence the concept of foreseeability." If not reviewed by this Court, this decision would cause much uncertainty and confusion.

There have been relatively few common law cases involving damages of innocent third parties in last clear chance situation. In admiralty, however, there have been and will be many such cases involving claims of other parties not charged with contributory fault, such as the owners of cargo, barges in tow and shore properties. This case also involves important federal and admiralty questions as to liabilities of the parties charged with prior and later faults in discovered peril and last clear chance situations, for the damages sustained by such other parties.

It is submitted that the Court of Appeals also departed from the accepted and usual course of judicial proceedings and the rule of *McAllister v. United States*, 348 U. S. 19 (1954) in making inferences and findings contrary to relevant and basic findings of the District Court which were not clearly erroneous but were fully supported by the entire evidence. It is further submitted that the Court of Appeals should not have disregarded substantial and uncontradicted evidence in reaching a clearly erroneous con-

clusion as to the precipitating force of the collision with the bridge.

This decision is in direct conflict with that of the Court of Appeals for the Sixth Circuit in *Dorrington v. City of Detroit*, 223 Fed. 232 (6 Cir. 1915), where an anchored vessel which was out of commission was set adrift toward the City's drawbridge in a high wind. The City claimed the shipowner was negligent in failing to properly anchor the vessel and man her sufficiently, and the District Court had ruled against the shipowner on those questions and dismissed his libel (p. 239). Notwithstanding any prior faults of the shipowner, the Court of Appeals held the City solely liable for the damage to the ship as the result of the failure of the bridge operator to raise the draw after he had observed the ship drifting toward the bridge in sufficient time to do so, the ship then having a statutory right of way.

It is also in conflict with the decisions of the Courts of Appeals in the Third, Fifth and Ninth Circuits. In *Crawford v. Indian Towing Co.*, 240 F. 2d 308, 311 (5 Cir. 1957), the Court of Appeals for the Fifth Circuit, holding the party having the last clear chance to avoid a collision solely liable for the resultant damages, said that its negligence was "the proximate" cause of the injury and that "Whether this be called an application of the doctrine of last clear chance or the rule of causation, makes little difference;" and in *Cenac Towing Co. v. Richmond*, 265 F. 2d 466, 472 (5 Cir. 1959), that Court reiterated its ruling in the *Crawford* case, saying: "Our courts have not been backward in applying the rule under whatever name it may be labeled." The same rule has also been held applicable to admiralty cases in the Third Circuit (*P. Dougherty Co. v. United States*, 207 F. 2d 626, 629-32, 3 Cir. 1953, cert. denied 347 U. S. 912), and in the Ninth (*United States v. Rothschild*

International Stevedoring Co., 183 F. 2d 181, 182 (9 Cir. 1950)).

It is also in conflict with many prior decisions of the Court of Appeals for the Second Circuit. That Court applied the same rule, sometimes in terms of "proximate" cause and "remote" cause or "condition" and sometimes in terms of assimilation to the "last clear chance" rule, in *The Perseverence*, 63 F. 2d 788 (2 Cir. 1933), cert. den. 289 U. S. 744; *The Cornelius Vanderbilt*, 120 F. 2d 766 (2 Cir. 1941); *The Sunnyside*, 251 Fed. 271 (2 Cir. 1918); *The Morristown*, 278 Fed. 714 (2 Cir. 1922); *The Syosset*, 71 F. 2d 666 (2 Cir. 1934); *The Sanday*, 122 F. 2d 325 (2 Cir. 1941); *The M. E. Luckenbach*, 200 Fed. 631, aff'd 214 Fed. 571 (2 Cir. 1914); and *The Panther*, 5 F. 2d 64 (2 Cir. 1925). In each of those cases the prior faults of the parties exonerated were major and not of a "rather low degree." In *The Perseverance*, the vessel freed from prior fault was anchored so as to unnecessarily obstruct the channel and continued to so obstruct it and "was far beyond where she should have been and impeded navigation." Judge Learned Hand said:

> "The situation is similar to that often comprised within the formula that a wrongdoer is solely liable if he has a 'last clear chance' of avoiding the damage" (p. 790).

In *The Sunnyside*, *The M. E. Luckenbach* and *The Panther*, the prior faults were furnishing defective lines which caused vessels to break adrift, negligence in causing a collision which cast two barges adrift, and deliberately casting off two barges when the tide was flood; and in each of those cases the fault for which another party was held solely liable was failure to drop an anchor or to have an anchor on board, to stop the drifting. In the other four cases the exonerated vessels first at fault were navigating on the wrong side of the channels and continued to do so.

It is emphasized that in each of the first five of the eight cases last cited above, the Court of Appeals for the Second Circuit applied the same rule of sole liability of the party later at fault *in respect to damages sustained by third parties not charged with fault.* The other three cases involved only the damages of one or more of the parties charged with the prior and later faults. If the admiralty rule of sole liability for claims of third parties in last clear chance situations is now to be changed, questions are presented as to primary and secondary liabilities, or whether the party actually having the last clear chance should be required to idemnify the party or parties charged with earlier fault, as to claims of third parties, as held in *Nashua I. & S. Co. v. Worcester & N. RR. Co.*, 62 N. H. 159 (1882) and *Colorado & S. Ry. Co. v. Western L. & F. Co.*, 73 Col. 107 (1923), among other cases at common law.

As to foreseeability: Whatever a prudent man might have foreseen in this case, it was not foreseeable that after receipt of the warning calls and actual knowledge of the necessity of raising the bridge draw for the passage of an approaching vessel and with full opportunity to do so, the bridge operators and crew would not raise the draw promptly or that they would negligently or deliberately fail to do so, in violation of their statutory duties,—for almost half an hour. Prior to this decision, this Court of Appeals (and many other courts) had held that under such circumstances the later negligence was a superseding cause of the resultant damages and the party charged with it should be held solely liable for them. In *Cleary Bros. v. Port Reading R. Co.*, 29 F. 2d 495, 498 (2 Cir. 1928) it said:

> "Ordinarily the first wrongdoer is not held responsible for damages which result both from his own negligence and that of a subsequently intervening third party, unless the latter's negligence was such as the

> first wrongdoer might reasonably have expected to occur."

and it reiterated that rule, among other cases, in *Hansen v. E. I. DuPont de-Nemours & Co.*, 33 F. 2d 94, 97 (2 Cir. 1929).

We have not found any decision of this Court deciding these questions as to the rights and liabilities of the parties in admiralty, in discovered peril and last clear chance situations. The rulings in this decision are, however, contrary to those of this Court in common law last clear chance cases that the later fault is the "proximate, direct and efficient cause" (*Inland & Seaboard Coasting Co. v. Tolson*, 139 U. S. 551, 559 (1891)); and that the rule is applicable where a party aware of the peril "or unaware of it only through carelessness" had a later opportunity to avert an accident (*Kansas City Southern Railway Co. v. Ellzey*, 275 U. S. 236 (1927)).

As to Kinsman's right to limit its liability: The Court of Appeals said, "the whole rationale of that doctrine is of questionable application in a case like this where there was no need for the owner to rely on the skill of a master or other agents as he must when a vessel is at sea or in a distant port." The facts outlined in the Statement, *supra*, pp. 18-22, show the nature of the additional questions presented as to the right of a corporate shipowner to limitation for fault and privity of an agency to which its executive officers had delegated part of their managerial functions, and as to breach of a personal contract.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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APPENDICES

Appendix A

OPINION.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 238 through 243—September Term, 1963.

(Argued March 3, 1964 Decided October 29, 1964.)

Docket Nos. 28387 through 28392

—o—

In the Matter of the Petitions
of
THE KINSMAN TRANSIT COMPANY, as Owner and Operator of the Steamer MacGilvray Shiras,
Appellant,

and of

MIDLAND STEAMSHIP LINE, INC., as Owner and Operator of the Steamer Michael K. Tewksbury, their Engines, etc.,
Appellee,

for Exoneration from or Limitation of Liability,

CITY OF BUFFALO,
Claimant-Respondent-Appellant,

KELLEY ISLAND NEW YORK CORPORATION, *et al.*,
Claimants-Appellees.

—o—

Before: Waterman, Moore and Friendly, *Circuit Judges*.

Appeals from an interlocutory decree of the District Court for the Western District of New York, Harold P.

Burke, Judge, adjudicating liability in proceedings in admiralty arising out of collisions in the Buffalo River. Modified and affirmed.

Edward J. Desmond (Elmer S. Stengel, Corporation Counsel, City of Buffalo) (John E. Drury, Jr., of Counsel), Buffalo, New York, for the City of Buffalo.

David S. Jackson, Buffalo, New York (Roy P. Ohlin, Wilbur H. Hecht, John J. Sullivan, of Counsel) (Ohlin, Damon, Morey, Sawyer & Moot, Buffalo, New York, and Mendes & Mount, New York, New York, on brief), for Continental Grain Company.

Lee C. Hinslea and Lucian Y. Ray (McCreary, Hinslea & Ray, Cleveland, Ohio) (James P. Heffernan, of Counsel) (Coffey, Heffernan & Harrison, Buffalo, New York, on brief), for The Kinsman Transit Company.

John T. Jaeger (Johnson, Branand & Jaeger, Cleveland, Ohio) (Robert Branand and Robert M. Hitchcock, of Counsel) (Phillips, Mahoney, Lytle, Yorkey & Letchworth, Buffalo, New York, on brief), for Midland Steamship Line, Inc.

W. M. Connelly (Hamilton, Dobmeier, Connelly & Kirchgraber), Buffalo, New York, for Tomlinson Fleet, *et al.*

Arthur E. Otten, Buffalo, New York (Brennan & Brennan, Buffalo, New York, on brief), for Kelley Island New York Corporation and Moira C. McGrane.

FRIENDLY, *Circuit Judge*:

We have here six appeals, 28 U. S. C. § 1292(a)(3), from an interlocutory decree in admiralty adjudicating liability. The litigation, in the District Court for the Western District of New York, arose out of a series of misadventures on a navigable portion of the Buffalo River during the night of January 21, 1959. The owners of two vessels petitioned for exoneration from or limitation of liability; numerous claimants appeared in these proceedings and also filed libels against the Continental Grain Company and the

City of Buffalo, which filed cross-claims. The proceedings were consolidated for trial before Judge Burke. We shall summarize the facts as found by him:

The Buffalo River flows through Buffalo from east to west, with many turns and bends, until it empties into Lake Erie. Its navigable western portion is lined with docks, grain elevators, and industrial installations; during the winter, lake vessels tie up there pending resumption of navigation on the Great Lakes, without power and with only a shipkeeper aboard. About a mile from the mouth, the City of Buffalo maintains a lift bridge at Michigan Avenue. Thaws and rain frequently cause freshets to develop in the upper part of the river and its tributary, Cazenovia Creek; currents then range up to fifteen miles an hour and propel broken ice down the river, which sometimes overflows its banks.

On January 21, 1959, rain and thaw followed a period of freezing weather. The United States Weather Bureau issued appropriate warnings which were published and broadcast. Around 6 P. M. an ice jam that had formed in Cazenovia Creek disintegrated. Another ice jam formed just west of the junction of the creek and the river; it broke loose around 9 P. M.

The MacGilvray Shiras, owned by The Kinsman Transit Company, was moored at the dock of the Concrete Elevator, operated by Continental Grain Company, on the south side of the river about three miles upstream of the Michigan Avenue Bridge. She was loaded with grain owned by Continental. The berth, east of the main portion of the dock, was exposed in the sense that about 150′ of the Shiras' forward end, pointing upstream, and 70′ of her stern—a total of over half her length—projected beyond the dock. This left between her stem and the bank a space of water seventy-

five feet wide where the ice and other debris could float in and accumulate. The position was the more hazardous in that the berth was just below a bend in the river, and the Shiras was on the inner bank. None of her anchors had been put out. From about 10 P. M. large chunks of ice and debris began to pile up between the Shiras' starboard bow and the bank; the pressure exerted by this mass on her starboard bow was augmented by the force of the current and of floating ice against her port quarter. The mooring lines began to part, and a "deadman," to which the No. 1 mooring cable had been attached, pulled out of the ground—the judge finding that it had not been properly constructed or inspected. About 10:40 P. M. the stern lines parted, and the Shiras drifted into the current. During the previous forty minutes, the shipkeeper took no action to ready the anchors by releasing the devil's claws; when he sought to drop them after the Shiras broke loose, he released the compressors with the claws still hooked in the chain so that the anchors jammed and could no longer be dropped. The trial judge reasonably found that if the anchors had dropped at that time, the Shiras would probably have fetched up at the hairpin bend just below the Concrete Elevator, and that in any case they would considerably have slowed her progress, the significance of which will shortly appear.

Careening stern first down the S-shaped river, the Shiras, at about 11 P. M., struck the bow of the Michael K. Tewksbury, owned by Midland Steamship Line, Inc. The Tewksbury was moored in a relatively protected area flush against the face of a dock on the outer bank just below a hairpin bend so that no opportunity was afforded for ice to build up between her port bow and the dock. Her shipkeeper had left around 5 P. M. and spent the evening watching television with a girl friend and her family. The collision

caused the Tewksbury's mooring lines to part; she too drifted stern first down the river, followed by the Shiras. The collision caused damage to the Steamer Druckenmiller which was moored opposite the Tewksbury.

Thus far there was no substantial conflict in the testimony; as to what followed there was. Judge Burke found, and we accept his findings as soundly based, that at about 10:43 P. M., Goetz, the superintendent of the Concrete Elevator, telephoned Kruptavich, another employee of Continental, that the Shiras was adrift; Kruptavich called the Coast Guard, which called the city fire station on the river, which in turn warned the crew on the Michigan Avenue Bridge, this last call being made about 10:48 P. M. Not quite ten minutes later the watchman at the elevator where the Tewksbury had been moored phoned the bridge crew to raise the bridge. Although not more than two minutes and ten seconds were needed to elevate the bridge to full height after traffic was stopped, assuming that the motor started promptly, the bridge was just being raised when, at 11:17 P. M., the Tewksbury crashed into its center. The bridge crew consisted of an operator and two tenders; a change of shift was scheduled for 11 P. M. The inference is rather strong, despite contrary testimony, that the operator on the earlier shift had not yet returned from a tavern when the telephone call from the fire station was received; that the operator on the second shift was tardy in arriving; and that it was thus impossible to raise the bridge until too late.

The first crash was followed by a second, when the south tower of the bridge fell. The Tewksbury grounded and stopped in the wreckage with her forward end resting against the stern of the Steamer Farr, which was moored on the south side of the river just above the bridge. The Shiras ended her journey with her stern against the Tewks-

bury and her bow against the north side of the river. So wedged, the two vessels substantially dammed the flow, causing water and ice to back up and flood installations on the banks with consequent damage as far as the Concrete Elevator, nearly three miles upstream. Two of the bridge crew suffered injuries. Later the north tower of the bridge collapsed, damaging adjacent property.

Judge Burke concluded that Continental and the Shiras had committed various faults discussed below; that the faults of the Shiras were without the privity or knowledge of her owner, thus entitling Kinsman to limit its liability,[1] 46 U. S. C. § 183; that the Tewksbury and her owner were entitled to exoneration; and that the City of Buffalo was at fault for failing to raise the Michigan Avenue Bridge. The City was not faulted for the manner in which it had constructed and maintained flood improvements on the river and on Cazenovia Creek, or for failing to dynamite the ice jams. For the damages sustained by the Tewksbury and the Druckenmiller in the collisions at the Standard Elevator dock, Judge Burke allowed those vessels to recover equally from Continental and from Kinsman, jointly and severally, subject, however, to the latter's right to limit liability. He held the City, Continental and Kinsman equally liable jointly and severally (again subject to Kinsman's limitation of liability) for damages to persons and property sustained by all others as a result of the disaster at the bridge.[2] But, on the basis of the last clear chance rule, he held the City

[1] The limitation fund was determined to be $76,788.45, the value of the Shiras and her freight, augmented by the amount to be realized on Kinsman's claim against the City; Kinsman does not appear to have asserted a claim against Continental. We assume the dollar figure was intended to bear interest. See 3 Benedict, Admiralty p. 573 (1940). Kinsman's brief conceded that the limitation amount stated in the interlocutory decree does not relate to the two personal injury claims. 46 U. S. C. § 183(b)-(f). But see 46 U. S. C. § 188 and Gilmore & Black, Admiralty, § 10-35 (1956).

[2] The judge reduced the personal injury claim of the bridge operator on the 11 P. M. shift by 50% for contributory negligence; he has not appealed.

solely liable for damages sustained by the other tort-feasors, to wit, the Shiras and Continental as operator of the Concrete Elevator, and refused to allow recovery by the City against them.

The complaints as to the judge's determinations are so numerous that, in order to deal properly with the most serious ones and avoid inordinate length, we must state our conclusions on the others in rather summary fashion:

(1) *Non-liability of the City of Buffalo for action and inaction in the upper reaches of the Buffalo River and Cazenovia Creek.*

On conflicting evidence, the trial judge concluded that the City had not created "a special hazard of ice jams" by its construction, completed twenty and thirty years previously, and its maintenance thereafter of flood improvements in the Buffalo River and Cazenovia Creek; he further found that the City's failure to dynamite ice jams on January 21, 1959, was not negligent. Since we accept these conclusions, it is immaterial at this point that we would disagree, for reasons later intimated, with his ruling that "the claimed faults on the part of the City in creating and failing to control those conditions were not proximately contributing causes" since "the disaster would not have occurred without the actionable faults of Continental and the Shiras." Nor need we reach the City's contention that it could not in any event be cast in liability for deficiencies in the improvements, the original plan for which had been submitted to the Secretary of War under the Act of March 3, 1899, 33 U. S. C. § 403, or for failure to take ameliorative action, either by way of further construction or through dynamiting, which allegedly would have been only voluntary on its part. *Cf. Faust v. City of Cleveland*, 121 Fed. 810 (6 Cir. 1903). But see *City of Detroit v. Wyan-*

dotte Transp. Co., 76 F. 2d 674 (6 Cir.), cert. denied, 296 U. S. 595 (1935).

(2) *Negligence of Kinsman and Continental.*

The mooring of the Shiras, as to which more will be said under the next heading, was the joint work of Kinsman, acting through Captain Davies, her former master, and of Continental. The judge was justified in holding that, with her bow protruding into the river just below a bend and with the eroded bank incapable of taking a long lead line or an anchor chain, the Shiras ought to have put out an anchor from her port bow. He was also warranted in finding that Continental was at fault for the inadequately secured "deadman" and the Shiras for the shipkeeper's failure to ready the anchors in the interval between 10 P. M. and 10:40 P. M. on January 21. The current and ice conditions on the fateful evening were not so unexpectable as to go beyond the range of foreseeability and hence to come within the principle of inevitable accident; the conditions were of the very sort that had been occurring for years, although not in quite the same degree. Kinsman and Continental say that no ship had drifted loose in the river as the result of the breaking of an ice jam since an episode in 1916 relating to *The Anna C. Minch*, 271 Fed. 192 (2 Cir. 1921), and that we exonerated her. However, the basis for exoneration was not that the strong currents and heavy ice were unexpectable but that the Minch had taken all reasonable precautions against them.

(3) *Limitation of Kinsman's liability.*

We find this issue more difficult; some further statement of the facts is required.

Kinsman's principal office is in Cleveland. It owned five vessels, four of which were in Buffalo in the winter of

1958-59. Kinsman is a family corporation; Henry Steinbrenner was its president and his son, George, then only twenty-eight years old and without maritime studies or experience, had become its vice president and treasurer in 1957.

The Shiras arrived in Buffalo with a cargo of grain for Continental late in November and was moored for the winter at the coal dock of the Lackawanna Railroad in the ship canal. Inspection of the grain revealed heating, which made it desirable to unload the Shiras and then reload her for further storage. George Steinbrenner went to Buffalo on December 8 to work out the plans; he returned to Cleveland on the 12th and, having gone to Florida on a vacation, was not in Buffalo again until after the accident. It is not shown that he had knowledge of the precise place where or the manner in which the Shiras would ultimately be moored.

When Kinsman had mooring or loading problems in Buffalo during the winter, it sometimes relied on its agents, Boland & Cornelius, and sometimes would dispatch one of its masters, grounded for the winter, who were paid for such work on a *per diem* basis. On this occasion it took the latter course. Henry Steinbrenner assigned the task to Captain Davies who had been master of the Shiras during the 1958 season. Davies came to Buffalo on three occasions. On the first he supervised the shifting of the Shiras to the unloading leg of the Concrete Elevator dock, on the second to the loading leg, and on the third, January 7, to the place east of the loading leg where she was expected to remain moored for the rest of the winter. The remooring was affected, without the aid of tugs, by a gang of Continental employees bossed by Kruptavich, which placed the lines on the shore. Kinsman had never made any effort to obtain information as to winter weather or harbor condi-

tions in Buffalo but relied on inspection and approval by United States Salvage Association, which was employed to that end by the Great Lakes Protective Association, a mutual insurance association of steamship operators. Rozycki, a marine surveyor employed by United States Salvage, inspected the mooring on January 8 and made a favorable report; a formal certificate of approval was later sent to Henry Steinbrenner.

The case gives point to the comment that the statutory phrase, "without the privity or knowledge of such owner," is largely "devoid of meaning," Gilmore & Black, Admiralty, 695 (1957)—a statement supplemented with the admittedly unhelpful comment: "Where a vessel is held in corporate ownership, the imputation of 'privity or knowledge' to the corporate owner will be made if a corporate officer sufficiently high in the hierarchy of management is chargeable with the requisite knowledge or is himself responsible on a negligence rationale. How high is 'sufficiently high' will depend on the facts of particular cases * * *" *Ibid.* 701. Henry and George Steinbrenner were "sufficiently high," but George had no knowledge of the mooring, and Henry had none save for Davies' report on his return from Buffalo and the United States Salvage certificate, both of which were reassuring rather than the reverse. They were not negligent in assigning the task to Davies, whose competence was established. Davies was not "sufficiently high," under the authorities cited below. His knowledge is imputed to the corporation on the issue of exoneration, but that is precisely what the statute forbids on the issue of limitation. Still it seems likely that if Kinsman's headquarters had been in Buffalo, limitation would be denied under *Spencer Kellogg & Sons v. Hicks*, 285 U. S. 502 (1932), on the basis that it was negligent not to check the adequacy of the mooring of the Shiras when dangerous conditions threat-

ened on January 21, or even that it was negligent to fail to make a cautionary inspection of the moorings of Kinsman's vessels in the harbor at an earlier date. If the latter view were taken, one might query the good sense of a distinction that would lead to a different result in this age of rapid transportation and communication because Kinsman's office was a few hundred miles away from the harbor where four of its five ships were berthed. The query seems especially pertinent when, as here, there is every indication that nothing different would have been done if George Steinbrenner had been on the scene during the final mooring as he had entrusted the operation to one admittedly more competent to oversee it than he was. Indeed, the whole rationale of the doctrine is of questionable application in a case like this where there was no need for the owner to rely on the skill of a master or other agents as he must when a vessel is at sea or in a distant port. All this, however, is not for us; shipowners and their insurers are entitled to rely on the statute and the decisions applying it, and we must take these as we find them until a higher authority intervenes. Although we doubt that the decisions can all be reconciled, this case is closer to *Craig v. Continental Ins. Co.*, 141 U. S. 638 (1891); *Quinlan v. Pew*, 56 Fed. 111 (1 Cir. 1893); *The Annie Faxon*, 75 Fed. 312 (9 Cir. 1896); and *The Erie Lighter 108*, 250 Fed. 490 (D. N. J. 1918), allowing limitation, than to *McGill v. Michigan SS. Co.*, 144 Fed. 788 (9 Cir.), cert. denied, 203 U. S. 593 (1906); *The Marguerite*, 140 F. 2d 491 (7 Cir. 1944); *The Clevecо*, 154 F. 2d 605 (6 Cir. 1946); *The Edmund Fanning*, 105 F. Supp. 353, 363-66, 371 (S. D. N. Y. 1952), aff'd as to this point, 201 F. 2d 281 (2 Cir. 1953), and *States SS. Co. v. United States*, 259 F. 2d 458 (9 Cir. 1957), cert. denied, 358 U. S. 953 (1959); *Admiral Towing Co. v. Wooten*, 290 F. 2d 641 (9 Cir. 1961); and *The Derrick Trenton*, 189 F. Supp. 400 (S. D. N. Y. 1960),

denying it. We are aware of the difference in the ages of the two sets of decisions, but we find nothing in the later cases reflecting on the authority of the earlier ones on fact situations within their sweep—a view which *Coryell v. Phipps*, 317 U. S. 406 (1943), tends to confirm.

Two other points must be considered. If the Shiras was not seaworthy in what has been termed the "primitive sense" of being "tight, staunch, strong and well and sufficiently tackled, appareled, furnished and equipped," a corporate owner who has failed in his duty to provide such a ship does not escape full liability, Gilmore & Black, *supra*, 702. It is argued that the Shiras was unseaworthy in this sense on the basis that although she put out all the mooring lines she had, their number was inadequate. The latter claim was the subject of conflicting testimony, and we take the judge's failure to fault the Shiras on this score as a finding, not clearly erroneous, that the claim was not established. Continental's claim that, under the "personal contract" exception, Gilmore & Black, Admiralty, §§ 10-26 ff., Kinsman may not limit liability to it because of breach of the warranty of seaworthiness in the storage contract signed by Henry Steinbrenner, is defeated both by lack of proof of breach[3] and by the fact that the exception would apply only to damage to the stored cargo, which did not occur. See 3 Benedict, Admiralty, 373 (1940).

(4) *Exoneration of Midland and of the Tewksbury.*

The exoneration of the Tewksbury and of her owner is challenged by the argument that the Tewksbury should have

[3] Although the shipkeeper's failure to ready the anchors may have rendered the Shiras unseaworthy in the expanded sense used in the seamen's personal injury actions, the contractual warranty is for "The fitness of the ship at the moment of breaking ground * * *, and not her suitability under conditions thereafter arising which are beyond the owner's control." *Cullen Fuel Co. v. W. E. Hedger, Inc.*, 290 U. S. 82, 88-89 (1933); *The Soerstaa*, 257 Fed. 130 (S. D. N. Y. 1919).

put out an anchor and an anchor chain and that it was negligent for her shipkeeper to be away. As to the former we see no sufficient reason to reject the judge's conclusion that, in view of the Tewksbury's sheltered position, the omission to take these added precautions, even in the conditions that had developed on January 21, was not negligent. As to the second point, it is not altogether clear whether the judge rested his conclusion on absence of negligence and also on lack of causal relation or solely on the latter. We should have difficulty in saying it was not negligent to leave the Tewksbury unguarded on what was known to be a perilous night, especially in view of the Buffalo ordinance forbidding any "master or other person owning or having charge of any vessel" to leave her in the harbor "without having on board or in charge thereof some competent person to control, manage or secure the same, without first obtaining permission of the harbor master." But we accept the judge's conclusion that the shipkeeper's presence would not have averted the disaster. The only ameliorative measure which it is suggested he might have taken is the dropping of the one anchor left to the Tewksbury after the Shiras destroyed the other. But it is highly questionable whether such action would have had a significant effect on the short rock-bottomed stretch between the Standard Elevator and the bridge. See *The Anna C. Minch*, 260 Fed. 522, 527 (W. D. N. Y.), 271 Fed. 192, 198 (2 Cir. 1921). Moreover, the shipkeeper might well have been reasonably reluctant to drop an anchor knowing that if it held, the Shiras would crash into the Tewksbury again.

We thus come to what we consider the most serious issues: (I) Whether the City of Buffalo was at fault for failing to raise the bridge on learning of the prospective advent of the Shiras and the Tewksbury; (II) the conse-

quences of the time relation of the City's failure to the prior faults of the Shiras and Continental; and (III) the effect of the allegedly unexpectable character of the events leading to much of the damage—and here of the *Palsgraf* case.

I. *The City's failure to raise the bridge.*

If this were a run of the mine negligence case, the City's argument against liability for not promptly raising the Michigan Avenue Bridge would be impressive: All the vessels moored in the harbor were known to be without power and incapable of controlled movement save with the aid of tugs. The tugs had quit at 4 P. M.; they were not docked in the river, and would not undertake after quitting time to tow a vessel into or out of the inner harbor. Since the breaking loose of a ship was not to be anticipated, it would have been consistent with prudence for the City to relieve the bridge crews of their duties.[4] Neglect by the crews ought not subject the City to liability merely because, out of abundance of caution, it had ordered them to be present when prudence did not so require. The case is unlike those in which a railway or a city, having undertaken to give warning signals at a crossing although under no duty to do so, is held liable to a plaintiff who relied on the absence of warning when it failed to continue its practice. See Prosser, Torts, 187, [illegible] fn. 87 (1955). It would be nonsense to suppose that Continental and the Shiras did what they did, and didn't what they didn't, in reliance on the bridge operators being sufficiently alert to avert disaster if the Shiras should break loose.

[4] The claimants cannot prevail on their argument that the City was bound to see to it that the bridge could be opened at all times to permit passage of the tug maintained by the fire department west of the bridge. Violation of a duty to take steps that would mitigate fire would not subject the City to liability for what occurred—the harm must be "within the risk." See note 9, *infra*.

Buffalo's adversaries answer with § 4 of the Bridge Act of 1906, 33 U. S. C. § 494, which requires, *inter alia*, that if a bridge over a navigable stream "shall be constructed with a draw, then the draw shall be opened promptly by the persons owning or operating such bridge upon reasonable signal for the passage of boats and other water craft." Buffalo replies that this general language cannot reasonably be construed to require that all drawbridges over all navigable streams in all fifty states shall be tended at all times of day or night, summer or winter, despite the near certainty that no traffic will approach. Alternatively it is arguable that a signal given when no traffic was to be expected would not be a "reasonable signal" unless this gave the bridge owner reasonable time to get someone down to the bridge to open it. However, an older statute, 28 Stat. 362 (1894), as amended, 33 U. S. C. § 499, makes it "the duty of all persons owning, operating, and tending the drawbridges * * * across the navigable rivers and other waters of the United States, to open, or cause to be opened, the draws of such bridges under such rules and regulations as in the opinion of the Secretary of the Army the public interests require to govern the opening of drawbridges for the passage of vessels and other watercrafts, and such rules and regulations, when so made and published, shall have the force of law * * *." The section goes on to authorize the promulgation of such regulations by the Secretary of the Army and to make it a misdemeanor to delay unreasonably the opening of a draw after reasonable signal. Pursuant to this authority, the Corps of Engineers promulgated 33 C. F. R. § 203.707, as follows:

> (a) The Michigan Avenue bridges across Buffalo River and Buffalo Ship Canal will not be required to open for the passage of vessels from 7:00 to 7:30 a. m., 8:00 to 8:30 a. m., 3:45 to 4:30 p. m., and 5:15 to 6:00 p. m.
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> * * *

(d) The closed periods prescribed in this section shall not be effective on Sundays and on New Year's day * * * [and other holidays].

(e) The draws of these bridges shall be opened promptly on signal for the passage of any vessel at all times during the day or night except as otherwise provided in this section. [None of the unquoted subsections provide otherwise.]

It is possible to read this statute and the regulations thereunder as creating by implication a cause of action, irrespective of negligence, for any person, or at least for any ship, injured by their breach. The power of Congress with respect to navigable streams is plenary; nothing prevents Congress from "abating any erections that may have been made, and preventing any others from being made, except in conformity with such regulations as it may impose." *Willamette Iron Bridge Co. v. Hatch*, 125 U. S. 1, 12-13 (1888). Responsive to that decision Congress has enacted that "The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is prohibited; * * *," 33 U. S. C. § 403; the Michigan Avenue Bridge was allowed to exist only subject to the conditions as to its raising previously stated. However, we are not here required to decide whether the statute and regulations create such an implied cause of action and, if so, in whose favor. See *United States v. Perma Paving Co.*, 332 F. 2d 754 (2 Cir. 1964). It is enough for this case that they lay down a standard of care with which bridge owners must comply in the absence of circumstances, not here present, excusing such compliance.

There can be no question as to this being so with respect to vessels in the ordinary course of navigation. *City of*

Chicago v. Chicago Transp. Co., 222 Fed. 238 (7 Cir.), cert. denied, 238 U. S. 626 (1915); *City of Cleveland v. McIver*, 109 F. 2d 69 (6 Cir. 1940). *Cf. Nassau County Bridge Auth. v. Tug Dorothy McAllister*, 207 F. Supp. 167 (E. D. N. Y. 1962), aff'd 315 F. 2d 631 (2 Cir. 1963). The same rule has been held applicable as to drifting vessels, *Dorrington v. City of Detroit*, 223 Fed. 232 (6 Cir. 1915). Although these were doubtless not in the forefront of Congress' mind, they too were within the general purpose of insuring freedom of navigation at which the statute was aimed. Compare *DeHaen v. Rockwood Sprinkler Co.*, 258 N. Y. 350 (1932); *Urie v. Thompson*, 337 U. S. 163, 191 (1949); contrast *Gorris v. Scott*, L. R. 9 Ex. 125 (1874), and see A. L. I. Restatement 2d, Torts § 286 (Tent. Draft No. 4, April, 1959), and Prosser, Torts, 157-58 (1955). The effect of the Corps of Engineers' regulation was to withdraw decision as to when the bridge might be left untended from what would otherwise have been a permissible area for exercise of the City's prudent judgment. See *The Pennsylvania*, 19 Wall. (86 U. S.) 125 (1875). Indeed, Buffalo exercised no judgment contrary to the regulation; the fault lay in its employees' failure to carry out the United States' commands and those of their employer.

II. *The time relation of the City's failure to the prior faults of the Shiras and Continental.*

All three parties held liable complain of the effect which the judge gave to the failure of the City to raise the bridge. Kinsman and Continental contend that the City's failure insulates them from liability for damages to others resulting from the collision at the bridge; the City objects to the imposition of sole liability for damage to the Shiras and to Continental and to the exoneration of these parties from liability for destruction of the bridge.

We speedily overrule the objections of Kinsman and Continental. Save for exceptions which are not here pertinent, an actor whose negligence has set a dangerous force in motion is not saved from liability for harm it has caused to innocent persons solely because another has negligently failed to take action that would have avoided this. See A. L. I. Restatement, Torts §§ 439, 447 and 452; Restatement 2d, Torts §§ 442A, 442B, and 452(1), comments *b* and *c* (Tent. Draft No. 9, April, 1963); Harper & James, The Law of Torts, 1146 (1956); James, Last Clear Chance: A Transitional Doctrine, 47 Yale L. J. 704, 708 (1938). As against third persons, one negligent actor cannot defend on the basis that the other had "the last clear chance." See Prosser, Torts, 291 and fn. 72 (1955); Bohlen, Contributory Negligence, 21 Harv. L. Rev. 233, 237-41 (1908); MacIntyre, The Rationale of Last Clear Chance, 53 Harv. L. Rev. 1225, 1234-35 (1940). The contrary argument grows out of the discredited notion that only the last wrongful act can be a cause—a notion as faulty in logic as it is wanting in fairness. The established principle is especially appealing in admiralty which will divide the damages among the negligent actors or non-actors.

On the other hand, we disagree with the judge's holding that because the City had "the last clear chance," Kinsman and Continental as plaintiffs against it are absolved of their negligence and the City as plaintiff is left without recourse against them. Here, as in the case of the injuries to persons not at fault, the damages should be divided. Explanation of our reasons requires some analysis of the origin of the last clear chance rule and of its application in admiralty.

As has been pointed out, the earliest common law decisions upholding the defense of contributory negligence were cases where the plaintiff's negligence came later than

the defendant's and rested on the now discarded belief that only the last negligent act could be a legal cause. See Bohlen, Contributory Negligence, *supra*, 21 Harv. L. Rev. at 238; 8 Holdsworth, A History of English Law 459 (2d ed. 1925); Harper & James, *supra*, 1241-45. This same notion that had thus given rise to contributory negligence as a complete defense then became the basis for avoiding it; the first and still the most current explanation of the last clear chance rule is that under such circumstances the plaintiff's negligence is not a proximate cause of his injury. *Dowell v. General Steam Nav. Co.*, 5 El. & Bl. 195 (1855); *Tuff v. Warman*, 5 C. B. (N. S.) 573, 585, 141 Eng. Rep. 231, 236 (1858). The error in this has been often demonstrated, see Prosser, Torts, 291; Harper & James, The Law of Torts, 1244, and fn. 18; the theory is, of course, entirely inconsistent with the acknowledged right of third persons to recover against the first as well as the second actor in the temporal chain. But, despite its demonstrable fallacy, the last clear chance doctrine has remained popular at common law as ameliorating the harshness of the rule whereby a negligent act of the plaintiff, often very slight in comparison to the dangerous conduct of the defendant, would otherwise bar recovery.

Although it might have been thought that the less severe consequences attributed to contributory negligence by the admiralty would have prevented the last clear chance doctrine from entering maritime law, see *The Norman B. Ream*, 252 Fed. 409, 414 (7 Cir. 1918), a number of factors dictated otherwise. One was the influence of English cases in the common law courts involving collisions in territorial waters; another was the manning of the Court of Appeal and the House of Lords and of both trial and appellate admiralty tribunals in this country with lawyers whose principal training was in the common law; a third—no

longer applicable in England since the Brussels Rules for apportioning damages in proportion to fault were adopted by the Maritime Conventions Act, 1 & 2 Geo. V. c. 57 § 1(1) (1911), but highly influential here—is that the doctrine, selectively applied, has helped to overcome results of the equal division principle which are sometimes quite as shocking as those of the common law bar for contributory negligence—especially in cases where reliance by a relatively innocent plaintiff on the "major-minor fault" exception has been thought to be barred by the rule of *The Pennsylvania*, 19 Wall. (86 U. S.) 125 (1874), that a party to a collision who has violated a statutory rule of navigation may not escape liability except on proof that the violation could not have contributed to the accident. See MacIntyre, *supra*, 53 Harv. L. Rev. at 1236-41; Gilmore & Black, Admiralty, 403-407, 438-442.

None of the cases in which this Court has applied the last clear chance rule to impose sole liability in admiralty is at all analogous to this one; indeed we doubt whether this case would come within the principle as generally applied at common law. One line of authority that is plainly distinguishable is where the vessel committing the later fault was contractually bound to care for the one guilty of an earlier fault of which the vessel held solely liable had become aware—typified by the tug that neglects a leaky tow, as in *Henry DuBois Sons Co. v. Pennsylvania RR.*, 47 F. 2d 172 (2 Cir. 1931), or in what was fated to be Judge Learned Hand's last opinion, *Chemical Transporter, Inc. v. M. Turecamo, Inc.*, 290 F. 2d 496 (2 Cir. 1961). See also *Sternberg Dredging Co. v. Moran Towing and Transp. Co.*, 196 F. 2d 1002 (2 Cir. 1952). In the other cases relied on by Continental and the Shiras, as in those just cited, the vessel solely charged had engaged in dangerous conduct in full knowledge of the peril created by the other's fault,

often small although statutory. *The Perseverance*, 63 F. 2d 788 (2 Cir.), cert. denied *sub nom. Cornell Steamboat Co. v. Lavender*, 289 U. S. 744 (1933); *The Sanday*, 122 F. 2d 325 (2 Cir. 1941); *The Socony No. 19*, 29 F. 2d 20 (2 Cir. 1928); *The Syosset*, 71 F. 2d 666 (2 Cir. 1934); *The Cornelius Vanderbilt*, 120 F. 2d 766 (2 Cir. 1941). Indeed, in the three cases last cited it is not altogether clear that the fault of the exonerated vessel was a "cause" in the sense that the accident was within the risk that made her action negligent. Furthermore, if, as we believe, what really happened here was that neither of the bridge operators was on hand in time to raise the bridge, the situation is one in which, in any realistic sense, the breach of duty—the first operator's going to the tavern and the second operator's starting late from home—was prior to any knowledge of the peril, and there was no possibility of remedy after the danger was discovered. Many states do not apply the last clear chance rule in such cases, see Harper & James, *supra*, 1245, 1251-55; Prosser, *supra*, 290, 295; A. L. I. Restatement of Torts, § 479, although there is famous authority for doing so. *British Columbia Elec. Ry. v. Loach* (1916), 1 A. C. 719 (P. C. 1915).

The last clear chance doctrine, not very satisfactory at best, has been utilized in admiralty quite selectively, to free a claimant from the consequences of a rather low degree of negligence in creating a dangerous situation of which the party whose activity led to the damage was well aware and which he could easily have overcome. It would be a far cry from that to impose on the City sole liability to the ship and the wharfinger whose negligence resulted in the crash with the bridge and to exempt the ship and the wharfinger from all liability for demolishing the City's property. In a ship-bridge collision somewhat the converse of this, where the ship had the last clear chance, we directed division of

damages, *Circle Line Sightseeing Yachts, Inc. v. City of New York*, 283 F. 2d 811 (2 Cir. 1960), cert. denied, 365 U. S. 879 (1961); the same course should be followed here.

III. *The allegedly unexpectable character of the events leading to much of the damage.*

The very statement of the case suggests the need for considering *Palsgraf v. Long Island RR.*, 248 N. Y. 339 (1928), and the closely related problem of liability for unforeseeable consequences.

In *Sinram v. Pennsylvania RR.*, 61 F. 2d 767, 769-70 (2 Cir. 1932), which received *Palsgraf* into the admiralty, Judge Learned Hand characterized the issue in that case as "whether, if A. omitted to perform a positive duty to B., C., who had been damaged in consequence, might invoke the breach, though otherwise A. owed him no duty; in short, whether A. was chargeable for the results to others of his breach of duty to B." Thus stated, the query rather answers itself; Hohfeld's analysis tells us that once it is concluded that A. had no duty to C., it is simply a correlative that C. has no right against A. The important question is what was the basis for Chief Judge Cardozo's conclusion that the Long Island Railroad owed no "duty" to Mrs. Palsgraf under the circumstances.

Certainly there is no general principle that a railroad owes no duty to persons on station platforms not in immediate proximity to the tracks, as would have been quickly demonstrated if Mrs. Palsgraf had been injured by the fall of improperly loaded objects from a passing train. *Cf.* the decision with respect to the husband in *Carey v. Pure Distributing Corp.*, 133 Tex. 31, 124 S. W. 2d 847 (1939). Neither is there any principle that railroad guards who jostle a package-carrying passenger owe a duty only to him; if the package had contained bottles, the Long Island

would surely have been liable for injury caused to close bystanders by flying glass or spurting liquid. The reason why the Long Island was thought to owe no duty to Mrs. Palsgraf was the lack of any notice that the package contained a substance demanding the exercise of any care toward anyone so far away; Mrs. Palsgraf was not considered to be within the area of apparent hazard created by whatever lack of care the guard had displayed to the anonymous carrier of the unknown fireworks.[5] The key sentences in Chief Judge Cardozo's opinion are these:

> "Here, by concession, there was nothing in the situation to suggest to the most cautious mind that the parcel wrapped in newspaper would spread wreckage through the station. If the guard had thrown it down knowingly and wilfully, he would not have threatened the plaintiff's safety, so far as appearances could warn him. Liability can be no greater where the act is inadvertent." 248 N. Y. at 345.

We see little similarity between the *Palsgraf* case and the situation before us. The point of *Palsgraf* was that the appearance of the newspaper-wrapped package gave no notice that its dislodgment could do any harm save to itself and those nearby, and this by impact, perhaps with consequent breakage, and not by explosion. In contrast, a ship insecurely moored in a fast flowing river is a known danger

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[5] There was exceedingly little evidence of negligence of any sort. The only lack of care suggested by the majority in the Appellate Division was that instead of endeavoring to assist the passenger, the guards "might better have discouraged and warned him not to board the moving train." 222 App. Div. 166, 167 (2d Dept. 1927). Chief Judge Cardozo said: "The man was not injured in his person nor even put in danger. The purpose of the act, as well as its effect, was to make his person safe. If there was a wrong to him at all, which may very well be doubted, it was a wrong to a property interest only, the safety of his package." 248 N. Y. at 343. Judge Andrews' dissent said the Long Island had been negligent, 248 N. Y. at 347, but did not state in what respect.

How much ink would have been saved over the years if the Court of Appeals had reversed Mrs. Palsgraf's judgment on the basis that there was no evidence of negligence at all!

not only to herself but to the owners of all other ships and structures down-river, and to persons upon them. No one would dream of saying that a shipowner who "knowingly and wilfully" failed to secure his ship at a pier on such a river "would not have threatened" persons and owners of property downstream in some manner.[6] The shipowner and the wharfinger in this case having thus owed a duty of care to all within the reach of the ship's known destructive power, the impossibility of advance identification of the particular person who would be hurt is without legal consequence. *Jackson v. B. Lowenstein & Bros.*, 175 Tenn. 535, 136 S. W. 2d 495 (1940); *Pfeifer v. Standard Gateway Theatre*, 262 Wis. 229, 55 N. W. 2d 29 (1952). Similarly the foreseeable consequences of the City's failure to raise the bridge were not limited to the Shiras and the Tewksbury. Collision plainly created a danger that the bridge towers might fall onto adjoining property, and the crash of two uncontrolled lake vessels, one 425 feet and the other 525 feet long, into a bridge over a swift ice-ridden stream, with a channel only 177 feet wide, could well result in a partial damming that would flood property upstream. As to the City also, it is useful to consider, by way of contrast, Chief Judge Cardozo's statement that the Long Island would not have been liable to Mrs. Palsgraf had the guard wilfully thrown the package down. If the City had deliberately kept the bridge closed in the face of the onrushing vessels, taking the risk that they might not come so far, no one would give house-room to a claim that it "owed no duty" to those who later suffered from the flooding. Unlike Mrs. Palsgraf, they were within the area of hazard.

The case is quite different from this Court's ruling in *Sinram*, where a tug which had negligently rammed a barge

[6] The facts here do not oblige us to decide whether the Shiras and Continental could successfully invoke *Palsgraf* against claims of owners of shore-side property upstream from the Concrete Elevator or of non-riparian property other than the real and personal property which was sufficiently close to the bridge to have been damaged by the fall of the towers.

was held free of liability for the loss of coal that a bargee subsequently allowed to be loaded into his barge without first having inspected her for damage. That case illustrates the principle, noted in Judge Hand's opinion, 61 F. 2d at 771, "that there must be a terminus somewhere, short of eternity, at which the second party becomes responsible in lieu of the first," Prosser, Torts, 280—a principle now explicitly recognized in the Restatement 2d Torts, § 452 (2) (Tent. Draft No. 9, April, 1963): "Where, by contract or otherwise, all responsibility for the protection of the other against the threatened harm is shifted to the third person, his intentional or negligent failure to act to prevent such harm is a superseding cause." See, applying this, *Ford Motor Co. v. Wagoner,* 183 Tenn. 392, 192 S. W. 2d 840 (1946); *Stultz v. Benson Lumber Co.,* 5 Cal. 2d 688, 59 P. 2d 100 (1936).[7]

Since all the claimants here met the *Palsgraf* requirement of being persons to whom the actors owned a "duty of care," we are not obliged to reconsider whether that case furnishes as useful a standard for determining the boundaries of liability in admiralty for negligent conduct as was thought in *Sinram,* when *Palsgraf* was still in its infancy. But this does not dispose of the alternative argument that the manner in which several of the claimants were harmed, particularly by flood damage, was unforeseeable and that recovery for this may not be had—whether the argument is put in the forthright form that unforeseeable damages are not recoverable or is concealed under a formula of lack of "proximate cause."[8]

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[7] Compare Professor Beale's "come to rest" rule, The Proximate Consequences of an Act, 33 Harv. L. Rev. 633, 651 ff. (1920), and Professor Seavey's "termination of risk" principle, Principles of Torts, 56 Harv. L. Rev. 72, 93 (1942).

[8] It is worth underscoring that the *ratio decidendi* in *Palsgraf* was that the Long Island was not required to use *any* care with respect to the package vis-a-vis Mrs. Palsgraf; Chief Judge Cardozo did not reach the issue of "proximate cause" for which the case is often cited. 248 N. Y. at 346-47.

So far as concerns the City, the argument lacks factual support. Although the obvious risks from not raising the bridge were damage to itself and to the vessels, the danger of a fall of the bridge and of flooding would not have been unforeseeable under the circumstances to anyone who gave them thought. And the same can be said as to the failure of Kinsman's shipkeeper to ready the anchors after the danger had become apparent. The exhibits indicate that the width of the channel between the Concrete Elevator and the bridge is at most points less than two hundred fifty feet. If the Shiras caught up on a dock or vessel moored along the shore, the current might well swing her bow across the channel so as to block the ice floes, as indeed could easily have occurred at the Standard Elevator dock where the stern of the Shiras struck the Tewksbury's bow. At this point the channel scarcely exceeds two hundred feet, and this was further narrowed by the presence of the Drukenmiller moored on the opposite bank. Had the Tewksbury's mooring held, it is thus by no means unlikely that these three ships would have dammed the river. Nor was it unforeseeable that the drawbridge would not be raised since, apart from any other reason, there was no assurance of timely warning. What may have been less foreseeable was that the Shiras would get that far down the twisting river, but this is somewhat negated both by the known speed of the current when freshets developed and by the evidence that, on learning of the Shiras' departure, Continental's employees and those they informed foresaw precisely that.

Continental's position on the facts is stronger. It was indeed foreseeable that the improper construction and lack of inspection of the "deadman" might cause a ship to break loose and damage person and property on or near the river—that was what made Continental's conduct negligent.

With the aid of hindsight one can also say that a prudent man, carefully pondering the problem, would have realized that the danger of this would be greatest under such water conditions as developed during the night of January 21, 1959, and that if a vessel should break loose under those circumstances, events might transpire as they did. But such *post hoc* step by step analysis would render "foreseeable" almost anything that has in fact occurred; if the argument relied upon has legal validity, it ought not be circumvented by characterizing as foreseeable what almost no one would in fact have foreseen at the time.

The effect of unforeseeability of damage upon liability for negligence has recently been considered by the Judicial Committee of the Privy Council, *Overseas Tankship (U. K.) Ltd. v. Morts Dock & Engineering Co. (The Wagon Mound)*, [1961] 1 All E. R. 404. The Committee there disapproved the proposition, thought to be supported by *Re Polemis and Furness, Withy & Co. Ltd.*, [1921] 3 K. B. 560 (C. A.), "that unforeseeability is irrelevant if damage is 'direct.'" We have no difficulty with the result of *The Wagon Mound*, in view of the finding, 1 All E. R. at 407, that the appellant had no reason to believe that the floating furnace oil would burn, see also the extended discussion in *Miller SS. Co. v. Overseas Tankship (U. K.) Ltd., The Wagon Mound No. 2*, [1963] 1 Lloyd's Law List Rep. 402 (Sup. Ct. N. S. W.). On that view the decision simply applies the principle which excludes liability where the injury sprang from a hazard different from that which was improperly risked, see fn. 9. Although some language in the judgment goes beyond this, we would find it difficult to understand why one who had failed to use the care required to protect others in the light of expectable forces should be exonerated when the very risks that rendered his conduct negligent produced other and more serious consequences to such persons than were fairly foreseeable when he fell

short of what the law demanded. Foreseeability of danger is necessary to render conduct negligent; where as here the damage was caused by just those forces whose existence required the exercise of greater care than was taken—the current, the ice, and the physical mass of the Shiras, the incurring of consequences other and greater than foreseen does not make the conduct less culpable or provide a reasoned basis for insulation.[9] See Hart and Honoré, Causation in the Law, 234-48 (1959). The oft encountered argument that failure to limit liability to foreseeable consequences may subject the defendant to a loss wholly out of proportion to his fault seems scarcely consistent with the universally accepted rule that the defendant takes the plaintiff as he finds him and will be responsible for the full extent of the injury even though a latent susceptibility of the plaintiff renders this far more serious than could reasonably have been anticipated. See Prosser, Torts, 260.

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[9] The contrasting situation is illustrated by the familiar instances of the running down of a pedestrian by a safely driven but carelessly loaded car, or of the explosion of unlabeled rat poison, inflammable but not known to be, placed near a coffee burner. *Larrimore v. American Nat. Ins. Co.*, 184 Okla. 614, 89 P. 2d 340 (1939). Exoneration of the defendant in such cases rests on the basis that a negligent actor is responsible only for harm the risk of which was increased by the *negligent aspect* of his conduct. See Keeton, Legal Cause in the Law of Torts, 1-10 (1963); Hart & Honoré, Causation in the Law, 157-58 (1959); Compare *Berry v. Borough of Sugar Notch*, 191 Pa. 345, 43 Atl. 240 (1899).

This principle supports the judgment for the defendant in the recent case of *Doughty v. Turner Mfg. Co.* [1964] 2 W. L. R. 240 (C. A.). The company maintained a bath of molten cyanide protected by an asbestos cover, reasonably believed to be incapable of causing an explosion if immersed. An employee inadvertently knocked the cover into the bath, but there was no damage from splashing. A minute or two later an explosion occurred as a result of chemical changes in the cover and the plaintiff, who was standing near the bath, was injured by the molten drops. The risk against which defendant *was* required to use care—splashing of the molten liquid from dropping the supposedly explosion proof cover—did not materialize, and the defendant was found not to have lacked proper care against the risk that did. As said by Lord Justice Diplock, [1964] 2 W. L. R. at 247, "The former risk was well known (that was foreseeable) at the time of the accident; but it did not happen. It was the second risk which happened and caused the plaintiff damage by burning." Moreover, if, as indicated in Lord Pearce's judgment, [1964] 2 W. L. R. at 244, the plaintiff was not within the area of potential splashing, the case parallels *Palsgraf*; Lord Justice Diplock's statement, [1964] 2 W. L. R. at 248, that defendants "would have been under no liability to the plaintiff if they had intentionally immersed the cover in the liquid" is reminiscent of Chief Judge Cardozo's quoted above.

The weight of authority in this country rejects the limitation of damages to consequences foreseeable at the time of the negligent conduct when the consequences are "direct," and the damage, although other and greater than expectable, is of the same general sort that was risked. See the many cases cited in Prosser, Torts, 260-62, fns. 75-78, and 263-64, and the recent reaffirmation, *Dellwo v. Pearson* 259 Minn. 452, 107 N. W. 2d 859 (1961), of Mr. Justice Mitchell's statement in *Christianson v. Chicago, St. P., M. & O. Ry.*, 67 Minn. 94, 96, 69 N. W. 640, 641 (1896), that the rule of *Hadley v. Baxendale*, 9 Exch. 341 (1854), has no place in negligence law. Other American courts, purporting to apply a test of foreseeability to damages, extend that concept to such unforeseen lengths as to raise serious doubt whether the concept is meaningful;[10] indeed, we wonder whether the British courts are not finding it necessary to limit the language of *The Wagon Mound* as we have indicated.[11]

[10] An instance is *In re Guardian Casualty Co.*, 253 App. Div. 360, 2 N. Y. S. 2d 232 (1st Dept.), aff'd, 278 N. Y. 674 (1938), where the majority gravely asserted that a foreseeable consequence of driving a taxicab too fast was that a collision with another car would project the cab against a building with such force as to cause a portion of the building to collapse twenty minutes later, when the cab was being removed, and injure a spectator twenty feet away. Surely this is "straining the idea of foreseeability past the breaking point," Bohlen, Book Review, 47 Harv. L. Rev. 556, 557 (1934), at least if the matter be viewed as of the time of the negligent act, as the supposedly symmetrical test of *The Wagon Mound* demands [1961] 1 All Eng. R. at 415. On the other hand, if the issue of foreseeability is viewed as of the moment of impact, see Seavey, Mr. Justice Cardozo and the Law of Torts, 52 Harv. L. Rev. 372, 385 (1939), the test loses functional significance since at that time the defendant is no longer able to amend his conduct so as to avert the consequences.

[11] In a recent case, workmen who had adjourned for their tea-break on a November afternoon left paraffin lamps as warnings around a tent covering an open manhole. Two boys determined to explore the manhole, using a ladder lying nearby; after they had performed this successfully, one of the lamps fell or was kicked into the manhole, an explosion occurred, and a boy fell in and suffered burns, particularly from applying his fingers to the hot rungs of the ladder. The Court of Sessions affirmed a defendant's judgment in deference to *The Wagon Mound*. The House of Lords reversed, their lordships explaining that this was not different from "the type or kind of accident * * * or occurrence that could reasonably have been foreseen." They stated that "The

(Footnote continued on following page)

We see no reason why an actor engaging in conduct which entails a large risk of small damage and a small risk of other and greater damage, of the same general sort, from the same forces, and to the same class of persons, should be relieved of responsibility for the latter simply because the chance of its occurrence, if viewed alone, may not have been large enough to require the exercise of care. By hypothesis, the risk of the lesser harm was sufficient to render his disregard of it actionable; the existence of a less likely additional risk that the very forces against whose action he was required to guard would produce other and greater damage than could have been reasonably anticipated should inculpate him further rather than limit his liability. This does not mean that the careless actor will always be held for all damages for which the forces that he risked were a cause in fact. Somewhere a point will be reached when courts will agree that the link has become too tenuous—that what is claimed to be consequence is only fortuity. Thus, if the destruction of the Michigan Avenue Bridge had delayed the arrival of a doctor, with consequent loss of a patient's life, few judges would impose liability on any of the parties here, although the agreement in result might not be paralleled by similar unanimity in reasoning; perhaps in the long run one returns to Judge Andrews' statement in *Palsgraf*, 248 N. Y. at 354-55 (dissenting opinion). "It is all a question of expediency, . . of fair judgment, always keeping in mind the fact that we endeavor to make a rule in each case that will be practical and in keep-

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(Footnote continued from preceding page)

fact that the features or developments of an accident may not reasonably have been foreseen does not mean that the accident itself was not foreseeable"; that "In order to establish a coherent chain of causation it is not necessary that the precise details leading up to the accident should have been reasonably foreseeable"; and that "to demand too great precision in the test of foreseeability would be unfair * * * since the facets of misadventure are innumerable." *Hughes v. Lord Advocate*, [1963] A. C. 837, 852, 855, 857, reversing 1961 S. C. 310. This comes very close to saying that where the damage was of the sort that was risked, foreseeability is not required.

ing with the general understanding of mankind." It would be pleasant if greater certainty were possible, see Prosser, Torts, 262, but the many efforts that have been made at defining the *locus* of the "uncertain and wavering line," 248 N. Y. at 354, are not very promising; what courts do in such cases makes better sense than what they, or others, say. Where the line will be drawn will vary from age to age; as society has come to rely increasingly on insurance and other methods of loss-sharing, the point may lie further off than a century ago. Here it is surely more equitable that the losses from the operators' negligent failure to raise the Michigan Avenue Bridge should be ratably borne by Buffalo's taxpayers than left with the innocent victims of the flooding; yet the mind is also repelled by a solution that would impose liability solely on the City and exonerate the persons whose negligent acts of commission and omission were the precipitating force of the collision with the bridge and its sequelae. We go only so far as to hold that where, as here, the damages resulted from the same physical forces whose existence required the exercise of greater care than was displayed and were of the same general sort that was expectable, unforeseeability of the exact developments and of the extent of the loss will not limit liability. Other fact situations can be dealt with when they arise.

We have considered whether we should alter the three-way division of damages, decreed by the judge in favor of claimants who were free from fault, so that the negligence of the City would be considered one efficient force and the combined negligence of Kinsman and Continental another, with a further division between the latter, subject to Kinsman's limitation of liability. See *The Eugene F. Moran*, 212 U. S. 466 (1909); *The Norwich Victory*, 77 F. Supp. 264 (E. D. Pa. 1948), aff'd 175 F. 2d 556 (3 Cir.), cert. denied, 338 U. S. 871 (1949); *Moran Towing & Transp.*

Co., Inc. v. Empresa Hondurena de Vapores, 194 F. 2d 629 (5 Cir.), cert. denied, 343 U. S. 978 (1952); *Pennsylvania R. Co. v. The Beatrice*, 275 F. 2d 209 (2 Cir. 1960). But the point has not been argued and although the issue may be sufficiently comprehended by Continental's appeal from being cast in any liability to enable us to consider it if we chose, contrast *International Milling Co. v. Brown SS. Co.*, 264 F. 2d 803 (2 Cir. 1959), we are reluctant to take the initiative in adding still another to the number of issues here decided, and the matter appears to have little practical importance if Kinsman's limitation stands.

A separate problem is how to deal, among the negligent parties, with that part of Kinsman's responsibility of which its limitation frees it. We think the fair solution is to divide that deficiency equally between Buffalo and Continental, rather than to hold Continental liable to Buffalo for the entire unsatisfied portion of Kinsman's share and *vice versa*. This comports with the spirit of the rule whereby damages owing to an innocent third party are apportioned equally among responsible tortfeasors if another, through limitation or insolvency, is incapable of responding for his share—even though neither Buffalo nor Continental can technically be a tortfeasor against itself. See *The Alabama*, 92 U. S. 695 (1876); *The City of Hartford*, 97 U. S. 323 (1877).

The decree is modified so that the City of Buffalo may recover two-thirds of the damages to its property from Continental and Kinsman subject to limitation by the latter but with Continental bearing only half of Kinsman's deficiency, that Continental may recover two-thirds of the damages to its property from the City and Kinsman subject to limitation by the latter but with the City bearing only half of Kinsman's deficiency, and that Kinsman, which

made no claim against Continental, may recover half of the damages suffered by the Shiras at the bridge from the City of Buffalo, which may then obtain contribution of half that amount from Continental. Under the principle of marshaling, see *United States v. Behrens*, 230 F. 2d 504 (2 Cir. 1956), cert. denied, 351 U. S. 919 (1956), *Moore-McCormack Lines v. Richardson*, 295 F. 2d 583 (2 Cir. 1961), cert. denied, 368 U. S. 989, 370 U. S. 937 (1962), the limitation fund should first be applied ratably to 50% of those claims of innocent parties for which Kinsman and Continental, but not the City, share responsibility, to wit, those damages to the Tewksbury and the Druckenmiller which occurred prior to the Tewksbury's collision with the bridge. If anything remains of the limitation fund thereafter, the City and Continental should precede other claimants. As so modified, the decree is affirmed.

Parties other than the City, Kinsman and Continental may recover their costs on appeal. The City, successful on the last clear chance issue but unsuccessful on others, may recover half costs against Kinsman and Continental. Kinsman, unsuccessful in its endeavor to avoid all liability but successful in holding its limitation, may recover half costs against the City and Continental, the two parties that challenged its limitation. Costs awarded against Kinsman shall be payable by it personally and not out of the limitation fund; costs payable to it shall not form part of the fund.

It is so ordered.

MOORE, Circuit Judge (concurring and dissenting):

I do not hesitate to concur with Judge Friendly's well-reasoned and well-expressed opinion as to limitation of Kinsman's liability, the extent of the liability of the City of Buffalo, Continental and Kinsman for the damages suf-

fered by the City, the Shiras, the Tewksbury, the Druckenmiller and the Farr and the division of damages.

I cannot agree, however, merely because "society has come to rely increasingly on insurance and other methods of loss-sharing" that the courts should, or have the power to, create a vast judicial insurance company which will adequately compensate all who have suffered damages. Equally disturbing is the suggestion that "[H]ere it is surely more equitable that the losses from the operators' negligent failure to raise the Michigan Avenue Bridge should be ratably borne by Buffalo's taxpayers than left with the innocent victims of the flooding." Under any such principle, negligence suits would become further simplified by requiring a claimant to establish only his own innocence and then offer, in addition to his financial statement, proof of the financial condition of the respective defendants. Judgment would be entered against the defendant which court or jury decided was best able to pay. Nor am I convinced that it should be the responsibility of the Buffalo taxpayers to reimburse the "innocent victims" in their community for damages sustained. In my opinion, before financial liability is imposed, there should be some showing of legal liability.

Unfortunate though it was for Buffalo to have had its fine vehicular bridge demolished in a most unexpected manner, I accept the finding of liability for normal consequences because the City had plenty of time to raise the bridge after notice was given. Bridges, however, serve two purposes. They permit vehicles to cross the river when they are down; they permit vessels to travel on the river when they are up. But no bridge builder or bridge operator would envision a bridge as a dam or as a dam potential.

By an extraordinary concatenation of even more extraordinary events, not unlike the humorous and almost-beyond-

all-imagination sequences depicted by the famous cartoonist, Rube Goldberg, the Shiras with its companions which it picked up en route did combine with the bridge demolition to create a very effective dam across the Buffalo River. Without specification of the nature of the damages, claims in favor of some twenty persons and companies were allowed (Finding of Fact #33, Interlocutory Decree, par. 11) resulting from the various collisions and from "the damming of the river at the bridge, the backing up of the water and ice upstream, and the overflowing of the banks of the river and flooding of industrial installations along the river banks." (Sup. Finding of Fact #26a.)

My dissent is limited to that portion of the opinion which approves the awarding of damages suffered as a result of the flooding of various properties upstream. I am not satisfied with reliance on hindsight or on the assumption that since flooding occurred, therefore it must have been foreseeable. In fact, the majority hold that the danger "of flooding would not have been unforeseeable under the circumstances to anyone who gave them thought." But believing that "anyone" might be too broad, they resort to that most famous of all legal mythological characters, the reasonably "prudent man." Even he, however, "carefully pondering the problem," is not to be relied upon because they permit him to become prudent "[W]ith the aid of hindsight."

The majority, in effect, would remove from the law of negligence the concept of foreseeability because, as they say, "[T]he weight of authority in this country rejects the limitation of damages to consequences foreseeable at the time of the negligent conduct when the consequences are 'direct.'" Yet lingering thoughts of recognized legal principles create for them lingering doubts because they say: "This does not mean that the careless actor will always be

held for all damages for which the forces that he risked were a cause in fact. Somewhere a point will be reached when courts will agree that the link has become too tenuous —that what is claimed to be consequence is only fortuity." The very example given, namely, the patient who dies because the doctor is delayed by the destruction of the bridge, certainly presents a direct consequence as a factual matter yet the majority opinion states that "few judges would impose liability on any of the parties here," under these circumstances.

In final analysis the answers to the questions when the link is "too tenuous" and when "consequence is only fortuity" are dependent solely on the particular point of view of the particular judge under the particular circumstances. In differing with my colleagues, I must be giving "unconscious recognition of the harshness of holding a man for what he could not conceivably have guarded against, because human foresight could not go so far." (L. Hand, *C. J.*, in *Sinram* v. *Pennsylvania R. Co.*, 61 F. 2d 767, 770, 2 Cir., 1932.) If "foreseeability" be the test, I can foresee the likelihood that a vessel negligently allowed to break its mooring and to drift uncontrolled in a rapidly flowing river may well strike other ships, piers and bridges. Liability would also result on the "direct consequence" theory. However, to me the fortuitous circumstance of the vessels so arranging themselves as to create a dam is much "too tenuous."

The decisions bearing on the foreseeability question have been so completely collected in three English cases[1] that no repetition of the reasoning pro and con of this principle

[1] *In re Polemis and Furness, Withy & Co.* [1921] 3 K. B. 560 (C. A.); *Overseas Tankship (U. K.) Ltd.* v. *Morts Dock & Engineering Co. Ltd.* (*The Wagon Mound*) [1961] 1 All E. R. 404; *Miller Steamship Company, Pty., Ltd.* v. *Overseas Tankship (U. K.) Ltd.* [1963] 1 Lloyd's Law List Rep. 402 (Sup. Ct., New South Wales).

need be made here. To these cases may be added the many American cases cited in the majority opinion which to me push the doctrine of foreseeability to ridiculous lengths—ridiculous, I suppose, only to the judge whose "human foresight" is restricted to finite limits but not to the judge who can say: It happened; *ergo*, it must have been foreseeable. The line of demarcation will always be "uncertain and wavering," *Palsgraf v. Long Island R. R.*, 248 N. Y. 337, 354 (1928), but if, concededly, a line exists, there must be areas on each side. The flood claimants are much too far on the non-liability side of the line. As to them, I would not award any recovery even if the taxpayers of Buffalo are better able to bear the loss.

Appendix B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 238 through 243—September Term, 1963.

(Submitted November 12, 1964 Decided December 1, 1964.)

Docket Nos. 28387 through 28392.

In the Matter of the Petitions
of
THE KINSMAN TRANSIT COMPANY, as Owner and Operator of the Steamer MacGilvray Shiras,

Appellant,

and of

MIDLAND STEAMSHIP LINE, INC., as Owner and Operator of the Steamer Michael K. Tewksbury, their Engines, etc.,

Appellee,

for Exoneration from or Limitation of Liability,

CITY OF BUFFALO,

Claimant-Respondent-Appellant,

KELLEY ISLAND NEW YORK CORPORATION, *et al.*,

Claimants-Appellees.

Before: Waterman, Moore and Friendly, *Circuit Judges.*

ON PETITION OF CONTINENTAL GRAIN COMPANY FOR REHEARING.

Continental has filed an effective petition for rehearing which questions several aspects of our decision, most im-

portantly that relating to the last clear chance doctrine. The petition is rather convincing that the bridge operator on the second shift did arrive in time to raise the bridge if everything had then been done with entire efficiency. Although this weakens the suggested make-weight as to possible inapplicability of the last clear chance doctrine if the case were governed by the common law, it leaves untouched the principal, and sufficient, ground of our decision on that issue. Continental argues also that its fault with respect to the deadman was minor and that the Shiras would ultimately have left her berth in any event. But, apart from the question whether Continental was not also jointly responsible for the improper mooring, we do not regard the fault as minor, and minutes proved to be vital. We have carefully considered Continental's other points but are not persuaded by them. We recognize that our decision bears severely on Continental and, as there indicated, we wish that Continental's burden could be less and Kinsman's more; but we conceive such a decision to lie beyond our power.

The opinion is modified in the following respects:

P. 3207, 9th line from bottom—Change "ten" to "twenty."

P. 3208, lines 4-6—Change to read as follows:

> that the operator on the second shift did not arrive until shortly before the call from the elevator where the Tewksbury had been moored; and that in consequence the bridge was not raised until too late.

Pp. 3223-24—starting with the word "Furthermore" in the 10th line from the bottom of *p. 3223* and continuing to the break on *p. 3224*—Change to read as follows:

> Furthermore, if, as we believe, what really happened here was that neither of the bridge operators was on

hand to raise the bridge when the first warning came, and the second operator had just arrived at the time of the second warning, the situation may well have been one in which "defendant did not in fact have a chance of avoiding injury to a negligent plaintiff but would have had such chance had it not been for some prior negligence," Harper & James, *supra*, 1251-55. Many states do not apply the last clear chance rule in such cases. See also Prosser, *supra*, 290, 295; A. L. I. Restatement of Torts § 479, although there is famous authority for doing so. British Columbia Elec. Ry. v. Loach, [1916] 1 A. C. 719 (P. C. 1915).

However the case would stand at common law, the last clear chance doctrine, not very satisfactory at best, has been utilized in admiralty quite selectively, to free a claimant from the consequences of a rather low degree of negligence in creating a dangerous situation of which the party whose activity led to the damage was well aware and which he could easily have overcome. See Gilmore & Black, *supra*, 404 & fn. 47. It would be a far cry from that to impose on the City sole liability to the ship and the wharfinger whose negligence resulted in the crash with the bridge and to exempt the ship and the wharfinger from all liability for demolishing the City's property. In a ship-bridge collision somewhat the converse of this, where the ship, if provided with a lookout, would have had the last clear chance, we directed division of damages, Circle Line Sightseeing Yachts, Inc. v. City of New York, 283 F. 2d 811 (2 Cir. 1960), cert. denied, 365 U. S. 879 (1961); the same course should be followed here.

Except as herein stated, the petition is denied.

Appendix C

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-ninth day of October, one thousand nine hundred and sixty-four.

Present: Hon. Sterry R. Waterman,
Hon. Leonard P. Moore,
Hon. Henry J. Friendly,
Circuit Judges.

In the Matter of the Petition
of
THE KINSMAN TRANSIT COMPANY, as Owner and Operator of the Steamer MacGilvray Shiras, etc.,
Appellant,

MIDLAND STEAMSHIP LINE, INC., as Owner and Operator of the Steamer Michael K. Tewksbury, etc.,
Appellee.

Appeal from the United States District Court for the Western District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Western District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the decree of said District Court be and it hereby is modified and as so modified said decree be and it hereby is affirmed with costs to appellants, City of Buffalo and Kinsman Transit Co., and appellees, Midland Steamship Line, Tomlinson Fleet Corp., *et al.*, Kelly Island New York Corp. and Moira G. McGrane, in accordance with the opinion of this Court.

A. DANIEL FUSARO,
Clerk.

Appendix D

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the first day of December, one thousand nine hundred and sixty-four.

Present: Hon. Sterry R. Waterman,
Hon. Leonard P. Moore,
Hon. Henry J. Friendly,
Circuit Judges.

In the Matter of the Petition
of
THE KINSMAN TRANSIT COMPANY, as Owner and Operator of the Steamer MacGilvray Shiras, etc.,
Appellant,

MIDLAND STEAMSHIP LINE, INC., as Owner and Operator of the Steamer Michael K. Tewksbury, etc.,
Appellee.

A petition for a rehearing having been filed herein by counsel for the appellant, Continental Grain Company.

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied except that the opinion of this court of October 29, 1964 herein be and it hereby is modified in accordance with the opinion of this court of December 1, 1964.

A. DANIEL FUSARO,
Clerk.

Appendix E

Excerpts from 46 U. S. C. Sec. 183:

"Sec. 183. *Amount of liability; loss of life or bodily injury; privity imputed to owner; 'seagoing vessel'*

"(a) The liability of the owner of any vessel, whether American or foreign, for any embezzlement, loss, or destruction by any person of any property, goods, or merchandise shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall not, except in the cases provided for in subsection (b) of this section, exceed the amount or value of the interest of such owner in such vessel, and her freight then pending.

"(b) In the case of any seagoing vessel, if the amount of the owner's liability as limited under subsection (a) of this section is insufficient to pay all losses in full, and the portion of such amount applicable to the payment of losses in respect of loss of life or bodily injury is less than $60 per ton of such vessel's tonnage, such portion shall be increased to an amount equal to $60 per ton, to be available only for the payment of losses in respect of loss of life or bodily injury. * * *

"(e) In respect of loss of life or bodily injury the privity or knowledge of the master of a seagoing vessel or of the superintendent or managing agent of the owner thereof, at or prior to the commencement of each voyage, shall be deemed conclusively the privity or knowledge of the owner of such vessel. * * *"